APPEALS TRAINING

8-DAY PO INDUCTION COURSE

TRAINERS' NOTES

Appeals and Litigation Training Team
Appeals & Litigation Directorate

8-day PO Induction course (Trainer's notes)

Day One

Introduction

- Trainer to introduce themselves, and explain their experience.
- Explain the course structure, classroom based with exercises and group work

Trainer to establish:

- Background of delegates
- Whether they have a clear understanding of what their new job is

Aim

To provide new POs with sufficient knowledge of asylum, human rights, deportation, EEA, PBS and managed migration cases, procedure rules and appeals legislation to begin their mentoring period.

Course timetable

Take them to the handout and briefly explain what will be covered on the course.

The role of the Presenting Officer

Presenting officers defend the Secretary of State's decisions to refuse persons a right to remain in the UK or a right to enter the UK before the Immigration and Asylum Chamber (IAC). They do this by testing a person's evidence before the IAC by cross-examining them, and then by making a submission (an argument) explaining why the Secretary of State believes her decision to be correct.

Ask delegates to read the professional standards for POs on the handout. Once they've done that, highlight a few to discuss in a little more detail.

Presenting Staff Professional Standards

General

You should establish a good level of knowledge of immigration law, case law, rules, policies, country information and effective advocacy skills and keep them up to date. You should regularly take part in training or other professional development activities to maintain and further develop your knowledge and skills.

Preparation for court

You should establish an excellent level of knowledge of the case, by fully preparing for the appeal in advance of the hearing. You should also research relevant immigration law, case law, rules, policies and country information in advance of the hearing.

When preparing for the appeal you should review the decision, taking into consideration new evidence (if any), and decide whether the decision can be defended in court. This check will help to improve the Agency's success rate for those cases that go on to a substantive appeal. Ensure that decisions to concede or to withdraw a decision are made in advance of the hearing and a senior officer consulted. You should also consult the original decision maker. In the case of criminal deportations, approval must be sought directly from a Criminal Casework Directorate Senior Caseworker (SCW).

Behaviour in court

You represent the Secretary of State and the Home Office when in Court. Therefore you must act with a high degree of professionalism and behave consistently in line with the Home Office values.

You should always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings.

You should attend court on time.

Presenting the case in court

Represent the decision-maker in court in line with the law, the applicable Immigration Rules, the EEA Regulations and UK Border Agency policies where appropriate, including the best interests of the child.

Having previously established that the decision can be defended, ensure each case is fully argued in court, responding to new evidence and issues raised by the Immigration Judge and the appellant or their representative. Deliver a persuasive and cohesive argument, structuring cross-examination and submissions accordingly. Where appropriate, introduce additional arguments to those raised in the original decision.

Pursue all relevant and appropriate aspects of the appellant's case or claim. Where it is intended to introduce new or additional grounds in support of the original decision, notification should be given to the appellant and their representative at the earliest opportunity and preferably in good time before the hearing. The new issues should be in line with the law, the Immigration Rules, the EEA Regulations and UK Border Agency policy.

In court, robustly defend the decision under appeal but be mindful that you must disclose evidence and material that is relevant to the facts in issue, irrespective of which party to the appeal this assists, in order to achieve a just determination of the case. You must not knowingly mislead the Immigration Judge or permit the Immigration Judge to be misled.

Test the evidence that has been given by the appellant (and any other witnesses) at earlier stages and at the hearing. Be sensitive to the circumstances of the appellant or witness who may (for example) be a child, a rape victim or a torture victim.

You should ensure cases are dealt with as efficiently and quickly as possible. Oppose unmeritorious adjournment requests and only apply for adjournments where it is absolutely necessary with, wherever possible, the approval of a senior officer.

Follow up

To help speed up appeals and reduce costs, where directions have been set by an Immigration Judge, ensure that they are complied with.

To help improve the quality of decisions, provide appropriate feedback to the decision maker within 2 working days.

To help improve the quality of management information - ensure that CID fields are updated and management returns are completed within 2 working days.

Ensure that post hearing minutes are accurate and completed within 2 working days.

Types of cases dealt with by Presenting Staff:

Asylum
Human Rights
Case management Reviews
Deportation
First Tier/Upper Tier/Continuance hearings
Bail

EEA
Entry Clearance
In-country Immigration cases i.e. applications to extend and vary leave
Race Relations

Her Majesty's Courts and Tribunal service – Immigration & Asylum Chamber (IAC)

Her Majesty's Courts and Tribunal Service – Immigration & Asylum Chamber, came into force on the 15/02/2010.

Prior to this there was a single tier system (The AIT) and earlier, another multi-tier system comprising of the IAA and the IAT. You may still hear and see references to this on case-law and in the legislation.

The Tribunal is divided into two tiers – first tier and Upper tribunal. Each tier is divided into different chambers. You will present at the Immigration and Asylum Chamber of the First Tier Tribunal.

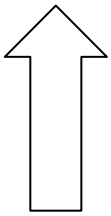
The Court and Tribunals Service is an independent body who hear appeals against all immigration and asylum decisions, whether those appeals stem from pre, on or post entry decisions.

Judges are appointed by the Ministry of Justice and will either be: Judges of the First Tier or Judges of the Upper Tier. Each regional hearing centre also has Resident Judges and Designated Judges - they are judges with management responsibility. The majority of cases that a PO will present will be before a single Judge of the First Tier.

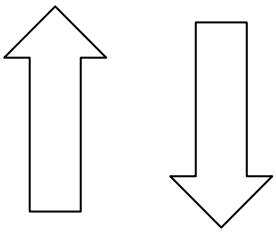
Court Structure

Draw this on the board

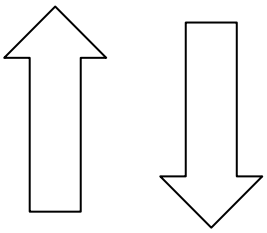
European Court of Human Rights/European Court of Justice



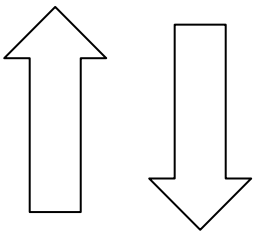
Supreme Court



Court of Appeal/Court of Session/High Court



Upper Tier Tribunal of the IAC



First Tier Tribunal of the IAC

Immigration control

Q - For what reasons do you think we need to have immigration control?

- Economic (We want people to visit the UK to spend money here, but we want to know that those visiting the UK can support themselves financially so that they are not a burden on the state.)
- Employment
- Skills (We want to attract people with certain skills to plug skills shortages in the UK.)
- Public good (E.g. serious criminals / those who pose a risk to health e.g. TB screening.)

Q - Is everyone entering the UK subject to immigration control?

Those with right of abode are not subject to immigration control – although they will need to show that they are entitled to it (i.e. passport)

Anyone who does not have a right to abode in the UK needs to be given Leave to Enter.

Q - What are the different types of immigration control that we employ?

Turn to HC395

The Immigration Rules set out the requirements that someone needs to meet in order to obtain entry clearance, leave to enter or leave to remain. These rules cover a variety of categories including visitors, students and settlement. Rule 6 sets out interpretations for the rules and if there are any areas that are not clear, you should refer to this section first.

Pre-Entry Control

Entry clearance – generic term for Visas, Entry Clearance & EEA Family Permits (we will be covering EEA later in the course).

Go through relevant section in HC395:

Para 24:
Visa national countries (Appendix 1 HC395) – if you are from a visa national country, then you require a visa / entry clearance in order to come to the UK under any circumstance (visit / student etc).

If you are from a non visa country, then you only require a visa if the Immigration Rules state so (usually this will be where the stay in the UK would be over 6 months etc).

Q - Where do you obtain a visa or entry clearance?

Paras 28-29:
Any application must be made outside the UK and will be made either at a High Commission (commonwealth countries) or an Embassy (non-commonwealth countries).

Para 30:
A fee is payable for the majority of applications. The fee that is paid is for the application process and NOT the decision. Therefore it is non-refundable even if an application is refused.

Visa application process – Depending on the post, there are a number of ways that someone can apply for entry clearance. The most common are:

In person

- Usually dealt with on the same day.
- The onus is on the applicant to show the ECO that they meet the requirements of the Immigration Rules.
- Achieved through submitting documents, and the relevant application form, and in some circumstances having a brief interview (which may be extended if necessary).

Through a commercial partner (CP)

- Collect the applications and supporting documents and deliver them to the visa office.
- Once a decision is made the decision is sent back to the CP who will pass this on to the applicant.
- This process saves applicants having to travel to the visa section, which in some countries may be a journey lasting several days. If more info is needed then the applicant will be invited for interview. Furthermore, with hub and spoke the visa section making the decision may not even be in the same country.

Online

Application is made online and the ECO will make a decision if possible based on the information provided. If insufficient details are provided, then the applicant may be invited for interview. However the onus is on the applicant to provide sufficient information for the application. They are informed online as to the information and supporting documents that will be required. The online application process is not available in every country, and some applicants will therefore still need to complete a paper form.

Generally speaking, there are over 2.5 million applications a year, and out of those approximately 80% of applicants are issued with visas.

To apply for a visa, the applicant has to:

- Complete the appropriate application form.
- Attach a photograph.
- Attach supporting documents.
- Lodge the application with the visa section or CP.
  Pay appropriate fee.
- Attend a Visa Application Centre to enrol biometrics unless exempt

In order to ensure fairness all ECOs follow the same sources of guidance:

- Immigration Rules.
- Entry Clearance Guidance (ECG's).
- AECIPS (Updates on policy / guidance).
- FCONET (Best Practice Guidance).

Decision making

ECO assesses the information provided and may invite the appellant for an interview:

- Grant – visa / EC issued

- Refused – may attract a full right of appeal (in these cases the applicant will have 28 days (if submitted in person) or 56 days (postal decisions) in which to appeal).

If the decision does not have a full right of appeal, it will attract a limited RoA on Human Rights and Race Relation grounds. It is rare that an applicant will appeal these decisions. You should always check the notice of decision to establish what the right of appeal is.

Provisio / CRS

When presenting entry clearance appeals, Presenting Staff will have the documents that the ECO sent for the appeal, but not the original file.

Each presenting unit has access to CRS – the Central Referencing System. This is automatically updated by the ECO's own system Proviso. By accessing CRS you will be able to see a read only version of the ECO's records, providing you with the history of the application, and the facility to print off saved copies of documents, e.g. interview records or the notice of decision. You should not print off the events pages as these may be subject to the Data Protection Act.

Refer trainees to the Notice of Decision example case study. These templates have been used by ECOs since Feb 2007. If they present a case with a less detailed decision, this will be an older case.

Entry clearance decisions are made by UKBA International Group.

DVD

On-Entry Control

Q. If an appellant has been granted entry clearance, does that mean that they are automatically granted leave to enter the UK when they arrive?

- Immigration officers are employed by UKBA to protect the UK's borders (Immigration Group Key Objective 1).
- Work at various border control points across the UK and France (UK Air / Sea & Rail Ports and Juxtaposed controls in Paris, Brussels, Calais and Coquelles where an IO sees the passengers before they have boarded the Eurostar / ferry etc).

On-entry control points are manned 24 hours a day, 365 days a year.

Responsibilities of an IO

Set out in Schedule 2 paragraph 2 of the 1971 Act

An immigration officer may examine any persons who have arrived in the United Kingdom by ship **[F3**or aircraft**]** (including transit passengers, members of the crew and others not seeking to enter the United Kingdom) for the purpose of determining—

(a)whether any of them is or is not **[F4**a British citizen**]**; and

(b)whether, if he is not, he may or may not enter the United Kingdom without leave; and

[F5(c)whether, if he may not—

(i)he has been given leave which is still in force,

(ii)he should be given leave and for what period or on what conditions (if any), or

(iii)he should be refused leave.]

The individual has to satisfy the Immigration Officer that he or she meets the requirements of the Immigration Rules and in accordance with 30(A) – 30 (C) of the Immigration Rules:

- There has not been a change in purpose since visa / EC gained (i.e. obtained a visit visa but wants to study).
- There has not been a change of circumstances (fiancé visa but relationship ended).
- The individual did not use deception or mislead the ECO (i.e. applied as a visitor but IO finds good luck in your new life cards).

Immigration Officers are given certain powers under the Immigration Act 1971, which aid them in identifying who qualifies for entry and those who do not. These include:

- The power to examine arriving passengers to determine if they require Leave to Enter and qualify for that leave.
- To require a person to submit to further examination.
- Require a passenger to produce a passport or other document.
- Power to search a passenger's baggage.
- Power to search for documents.
- To produce a completed landing card.
- Power to remove a person.
- Power to detain.

Only after the IO has been satisfied with the passengers nationality and identity – and that they meet the requirements of the rule, will the IO give effect to the entry clearance.

After Entry Control

After entry control covers any application that is made after the appellant has been granted Leave to Enter the UK (If an applicant claims asylum at port before being granted LTE then this remains a port case). Asylum can not be claimed at the juxtaposed controls because these are not ports of entry.

After entry cases:

In country Asylum / Human Rights cases

- Applications typically will be made in person and at an Asylum Screening Unit although some people may apply via solicitors or the police.
- A caseworker from a Regional Asylum Team is assigned the case to assess the merits of the asylum claim.
- If it is considered that there is no valid claim, or that the appellant does not meet the criteria in the refugee or human rights conventions, then a notice of decision will be sent which may give rise to a right of appeal. The decision will be accompanied by a detailed letter explaining why the decision was reached.
- If however it is considered that the appellant should be recognised as a refugee, then leave will be granted for an initial period of 5 years.

Extensions of stay under the Immigration Rules

- When an individual has been granted leave to enter under the Immigration Rules, this will have an expiry date to it (unless it is an application for indefinite leave to enter / remain). To lawfully remain in the UK the applicant will have to apply to extend this leave.
- The application will be assessed according to the evidence that has been provided and the requirements of the Immigration Rules.
- If satisfied that the rules are met, the appellant will be granted further leave.
- If the applicant fails to meet the requirements then they may have either a full or limited right of appeal.

Settlement Applications

- Similarly to extension of stay applications, these are usually made under the Immigration Rules.
- Alternatively, the application may be as a result of a specific discretionary policy that applies at that time.
- The applications have to be evidenced and made via the particular team or department that is dealing with the policy or the applications (i.e. managed migration).

EEA applications

These will be dealt with by the European Casework team. There is a different set of rules that are applied than HC395 – we will be covering these later in the course.

All After-Entry decisions are made by the UK Border Agency.

HC395 application

The Immigration Rules lay down the criteria that people have to meet (if they require a visa) in order to obtain entry clearance / leave to enter or remain.

People either come under the rule or they do not. Most of the rules are self-explanatory when setting out the requirements however some refer to i.e. public funds / adoption / settled in UK. The terms of reference in the Immigration Rules offer interpretation of these:

Para 6 i.e. public funds = housing benefit / disability living allowance / working tax credits / child tax credits etc but not treatment offered by NHS.

Definition of LTE – Paragraph 7 – 9
Definition of LTR – Paragraph 31-33A

Grant of Asylum – Paragraph 334
Refusal of Asylum – Paragraph 336-339
Revocation or refusal to renew a grant of asylum – Paragraph 339A-339BA
Grant of Humanitarian Protection – Paragraph 339C
Exclusion from HP – Paragraph 339D-339E
Refusal of HP- Paragraph 339F
Revocation of HP – Paragraph 339G –339H

HC395 application

Divide into groups – Hand out scenarios, each group to look at all 4 scenarios. Allocate between 30-45 minutes for this exercise.

Family Visitor 1

Nelson is from Ghana and wants to come and visit his mother who is present and settled in the UK. He wishes to stay for one month. He has just finished a degree in his home country, and has not yet got a job. He is single and sees this as a good time to visit his mother who is willing to pay for his ticket, and has a spare room for him in her house. He does not have any money. In fact he has debt acquired from his studies, but his mother will pay for his food and travel while he is here.

Consider Nelson's case under paragraph 41 of HC395.

1. **Would you grant or refuse Nelson under paragraph41?**
2. **Why?**
3. **Would you want more information? If so what?**
4. **Are there any questions you want to ask?**

Things to cover - Paragraph 41:

Intention is very difficult to argue. Would a graduate in the UK have found a job yet / have debts? This could be argued as the most appropriate time to visit (before he has responsibilities of job etc). What are his current connections to Ghana?

Present and settled. Refer to interpretation in paragraph 6

Evidence of Mother's ability to meet costs of flight / maintain and accommodate Nelson is needed.

If Nelson states that staying on his Mother's sofa for a month – would this be ok? Whether accommodation is adequate is determined by the 1985 Housing Act. Would the properly be overcrowded as defined by the 1985 Housing Act if Nelson stayed? To determine this we need to know how many rooms the property has and whether anybody else lives there.

Family Visitor 2

Sara is from Bangladesh and intends to stay with her grandmother for 8 months. She will live with her grandmother in London, and visit places like Buckingham Palace and Madame Tussauds. Her grandmother will pay for everything, and at the end of the visit, Sara intends to go and visit a friend in France

Consider Sara's case under paragraph 41 of HC395.

1. **Would you grant or refuse Sara under the relevant rule?**
2. **Why?**
3. **Would you want more information? If so what?**
4. **Are there any questions you want to ask?**

Things to cover – Paragraph 41

41 (i) – fails at first hurdle – she is intending to stay for 8 months. Consider if she is staying for 6 months.

Staying with sick grandmother or acting as a carer? Questions needed to ascertain whether she is genuinely coming to visit or to care for grandmother. This can raise questions as to intention since the need for her to stay will be greater if her grandmother becomes reliant on her. Please note the case of **Oppong (Visitor – length of stay) Ghana [2011] UKUT 00431 (IAC)** "In certain circumstances a person can utilize paragraph 41 in order to visit the UK to provide temporary care for a relative present and settled here." [taken from the ratio decidendi] The important point is that they must leave the UK at the end of the 6 month period.

Evidence of grandmother's finances / Accommodation is needed

Evidence of friend in France, perhaps letter of invite from her too, not essential according to the rule, but it may assist the appellant in demonstrating intention to leave the UK

Child visitor – Paragraph 46 – make sure trainees are aware of the different requirements.

Settlement for children

Christian is 17 years old and wishes to settle in the UK with his father, having spent all of his life in Nigeria. Unfortunately his mother died 6 months ago, and he has been living with his elderly grandmother since her death. However, Christian's father has been responsible for him since this time, and has been a great source of comfort over the last six moths, visiting Nigeria twice and helping him choose a university. Christian's father has a flat with 2 bedrooms. At present he lives on his own. He is a barrister.

Consider Nelson's case under paragraph 297 of HC395.1. Would you grant or refuse Christian under the relevant rule?
2. Why?
3. Would you want more information? If so what?
4. Are there any questions you want to ask?

Things to cover: paragraph 297

Is the mother really dead? Evidence will be needed i.e. death certificate. Highlight the difference in the Immigration Rules between 297 (i) (d) and (i) (e)

Present and settled:

Present: In the UK
Settled: Para 6

Q: what would someone have to show to demonstrate that they had had sole responsibility for a child?

Sole responsibility:

TD (Paragraph 297 (i) (e): "sole responsibility") Yemen [2006] UKAIT 00049

"Sole responsibility" is a factual matter to be decided upon all the evidence. Where one parent is not involved in the child's upbringing because he (or she) had abandoned or abdicated responsibility, the issue may arise between the remaining parent and others who have day-to-day care of the child abroad. The test is whether the parent

has continuing control and direction over the child's upbringing, including making all the important decisions in the child's life. ***However, where both parents are involved in a child's upbringing, it will be exceptional that one of them will have "sole responsibility".***

Paragraph 6 of HC395:

"must not be leading an independent life" means that the applicant does not have a partner as defined in Appendix FM; is living with their parents (except where they are at boarding school as part of their full-time education); is not employed full-time or for a significant number of hours per week (unless aged 18 years or over); is wholly or mainly dependent upon their parents for financial support (unless aged 18 years or over); and is wholly or mainly dependent upon their parents for emotional support

297 (v) – maintenance.

Paragraph 6 of HC395:

"'adequate' and 'adequately' in relation to a maintenance and accommodation requirement shall mean that, after income tax, national insurance contributions and housing costs have been deducted, there must be available to the family the level of income that would be available to them if the family was in receipt of income support."

KA and Others (Adequacy of maintenance) Pakistan [2006] UKAIT 00065

The requirement of adequacy is objective. The level of income **and** other benefits that would be available if the family were drawing income support remains the yardstick

Mahad (Previously referred to as AM) (Ethiopia) v Entry Clearance Officer [2009] UKSC16

Third party support is permitted to enable the appellant to demonstrate the maintenance requirement has been met. Evidence will be needed to confirm that this money is available since the Supreme Court themselves noted that

"3rd party promises are likely to be more precarious and less easily verifiable than a sponsors own legal entitlements" (para 19). They go on to conclude that this however will not always be the case.

Child Trafficking

Highlight to trainees the importance of child settlement cases and the real threat of child trafficking to the UK.

Other points to mention:

Date of application applies with children:

27. An application for entry clearance is to be decided in the light of the circumstances existing at the time of the decision, except that an applicant will not be refused an entry clearance where entry is sought in one of the categories contained in paragraphs 296-316

solely on account of his attaining the age of 18 years between receipt of his application and the date of the decision on it.**Section 55 of the Borders, Citizenship and Immigration Act 2009** requires the UK Border Agency to carry out its functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

S55 effectively puts Article 3 of the UNCRC into domestic law

Article 3 of The United Nations Convention on the Rights of Children (UNCRC) states

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."

Primary consideration does not mean the only consideration; it means one primary consideration in the decision.

Section 55 is domestic legislation and it is does not have any application outside the UK's borders.

Paragraphs 2.34 – 2.36 of the statutory guidance on s55 – Every Child Matters: Change for Children – sets out the position for children and UKBA staff overseas. Section 55 doesn't apply to children who are outside the UK but UKBA staff must adhere to the spirit of the duty and make inquiries where they have reason to suspect that a child may be in need of protection or safeguarding, or presents welfare needs that require attention.
ZH (Tanzania) is the key case in relation to section 55. You should be aware of this case, however, bear in mind that the appellant in ZH was in the UK (unlike decisions made out-of-country by ECOs). Refer delegates to summary on handout.

Spouse of a refugee

Mohammed is from Somalia but has been living in Ethiopia since 1999. His wife, Saida, came to the UK with their two children in 1992 and has been recognised as a refugee. They married in a religious ceremony in 1988 but have not seen each other since Saida came to the UK. They state however that they are in regular telephone contact. Saida does not work, she receives disability, housing and child benefit but states that she will also be able to support Mohammed.

Consider Mohammed's case under paragraph 352A of HC395.1. Would you grant or refuse Mohammed under the rule?
2. Why?
3. Would you want more information? If so what?
4. Are there any questions you want to ask?

Things to cover – paragraph 352A

There is no requirement for the appellant to show that he will be adequately accommodated and maintained.

Recognised marriages The United Kingdom will recognise a foreign marriage as valid if it was valid under the laws of the country(s) in which **both parties are domiciled**. This is the case even if the marriage would not be valid if it had been carried out in the United Kingdom (e.g. "proxy" marriages).

The validity of foreign marriages can be a highly complex subject, particularly where it involves questions of domicile. You should ensure that you discuss any areas of difficulty with a SCW.

CB (validity of marriage: proxy marriage) Brazil [2008] UKAIT00080
Both parties to the marriage were in the UK at the time that the proxy marriage was carried out in Brazil.

"Capacity to marry is regulated by domicile but there is no suggestion here that the appellant and his wife lacked capacity to marry. It is equally clear that the validity of the marriage is governed by the lex loci celebrations which is Brazilian law and it is common ground that Brazilian law recognises proxy marriages" (paragraph 21)

The marriage needs to have taken place before the spouse left the country of his former habitual residence in order to seek asylum (NB the spouse will need to show that they were granted asylum, not necessarily that they simply have ILR in the UK)

ZN (Afghanistan) & Ors v ECO (Karachi) [2010] UKSC 21

Applications from appellant's who were refugees but have since been granted British Citizenship will still come under paragraph 352A (and for child applications 352D), and not 281.

"The court regards the construction advanced on behalf of the appellants as the more natural meaning of the words used. The grant of asylum is a specific event. This is underlined by the words of sub-para (i) of para 352A, which simply says that the applicant must be married to "a person granted asylum" and thus naturally refers to a particular historic event and not to an existing condition…" (paragraph 28).

NB: 352A does not include post-flight spouses i.e. the spouse of a refugee, where the marriage took place AFTER the refugee fled their home country and had been granted refugee leave. The relevant immigration rule for post-flight spouses is 319L.

What is the Points Based System?

Previously there were 80 routes through which to enter the UK to work, study or train. PBS now replaces them with 5 tiers (some of the tiers are sub-divided further). All tiers are currently open except tier 3.

Each of the system's 5 tiers has different points requirements - the number of points the migrant needs and the way the points are awarded will depend on the tier.
The PBS was developed following a public consultation which emphasised the need for clear, objective criteria, rather than the subjective, discretionary and inconsistent decisions that had characterised the previous routes.

The PBS tiers:

Tier 1 – High value migrants

Exceptional Talent: This route is for applicants who are internationally recognised as world leaders in science, engineering, humanities or the arts and wish to bring their skills to the UK. There is a limit of 1000 visas per year under this route.

General: This route is for migrants who wish to find highly-skilled employment or self-employment in the UK. This route closed for out-of country applicants on 23 December 2010. It also closed for in-country applicants on 6 April 2011 except for extensions for those who are already in the route or one of the predecessor routes. These are: Highly Skilled Migrant Programme; Self-Employed Lawyers; Writers; Composers; Artists.

Entrepreneurs: This route is for those investing in the UK by setting up or taking over or being actively involved in the running of a business.

Investors: This route is for high net-worth individuals making a substantial financial investment in the UK.

Post-Study Work: This route is for the most able international graduates who have studied in the UK. Sponsorship is not required under this route. It provides a bridge to other routes under Tier 1 or Tier 2. This route closed to new applicants on 6 April 2012.

Graduate Entrepreneurs: This route is for graduates who have been identified by Higher Education Institutions in the UK as having developed innovative business ideas to stay on in the UK after graduation to develop their businesses.

Tier 2 – Sponsored skilled workers

This tier allows UK employers to recruit workers from outside the EEA to fill a particular vacancy that employers cannot fill with British or EEA workers.
To be eligible under Tier 2 the applicant must have a skilled job offer and a Certificate of Sponsorship (CoS) from an organisation that is a licensed sponsor in the UK. More on sponsorship later…

General: This route is for Shortage Occupations and jobs where sponsors have carried out a Resident Labour Market Test and found no suitable resident workers are available. Tier 2 General is subject to an annual limit of 20,700 a year.

Intra-Company Transfer: This route is for is for employees of multinational companies who are being transferred by their overseas employer to a UK branch of the organisation, either on a long-term basis or for frequent short visits. The four sub-categories under this route are as follows: Long-term staff; Short-term staff; Graduate Trainee; Skills Transfer.

Ministers of Religion: This category is for people who want to take up employment or posts or roles within their faith communities in the UK as: ministers of religion undertaking preaching and pastoral work; missionaries; or members of religious orders.

Sportspeople: This route is for is for elite sportspeople and coaches who are internationally established at the highest level, and will make a significant contribution to the development of their sport.

The Intra-Company Transfer, Ministers of Religion and Sportspeople routes are not subject to the limits that have recently been imposed. More on limits and caps later…

Tier 3 – Low-skilled workers

This tier has never been opened and there are no plans to do so, as the Government considers that all low-skilled jobs can be filled from the UK and EEA workforce.

Tier 4 – Students

Tier 4 Students is the largest category of appeals you are likely to see. When presenting such an appeal you should be aware of the key changes to the Immigration Rules.

General: This route is for adult students to enter or remain in the UK for the purpose of post-16 education. Those applying under this route must have both a sponsor and a Confirmation of Acceptance for Studies (CAS).

Children: This route is for children between the ages of 4 and 17. If they are between 4 and 15 years old, their education in the UK must be at a fee-paying school. Children aged 16 or 17 may need to apply under Tier 4 (General), not Tier 4 (Child).

Tier 5 – Youth mobility and temporary work

Youth Mobility Scheme: This route is for young people from participating countries who would like to experience life in the United Kingdom. Sponsored young people from participating countries will be allowed to come to the United Kingdom for up to two years, while young United Kingdom nationals enjoy similar opportunities in participating countries. These young people will be free to do whatever work they like during their stay in the United Kingdom, except for setting up their own business, playing professional sport or working as a doctor in training. Entry Clearance will not be granted unless an applicant has sponsorship. They must also be a citizen of one of the following countries/territories:

Australia; Canada; Japan; New Zealand; Monaco; Taiwan; South Korea (South Korea was added on 9 July 2012)

Temporary Worker: This route is for those who wish to enter the UK to work for a limited period of time. The sub-sections under which a person may apply under this category are as follows:

Creative and Sporting; Charity Worker; Religious Worker; Government Authorised Exchange; International Agreement.

Points Scoring

The points criteria for each of the rules are contained within the Immigration Rules at part 6A and its appendices.

In all routes, applicants will need to score points from Appendix A (attributes). This includes the points for sponsorship in the routes that require a sponsor. Depending on the route, applicants may also need to score points from Appendix B (English language ability) and/or Appendix C (maintenance funds).

For example to enter as a Tier 1 Entrepreneur migrant the applicable rule will be 245DB.

The applicant will need to meet the requirements of the rule which includes:

75 points from paragraph 35-53 of Appendix A

10 points from paragraph 1-15 of Appendix B

10 points from paragraph 1-2 of Appendix C

The role of the sponsor

With the exception of Tier 1 and Tier 5 (youth mobility scheme) all migrants must be **sponsored** before they can apply to us.

Note to trainer: Tier 1 (Exceptional Talent) applicants have to be endorsed by a competent body. This is similar to, but not the same as sponsorship: the competent body decides whether to endorse the application, but then their involvement ends. Sponsors have ongoing responsibilities for the migrants who are working for/studying with them.

Under Tier 2 and Tier 5 (Temporary workers), the sponsor must be an employer based in the UK. Under Tier 4, the sponsor must be an education provider.

If a UK organisation wants to sponsor a migrant under Tier 2, Tier 4 or Tier 5 (Temporary workers), they must apply to us for a sponsor licence.

To be granted a license, sponsors must:

- prevent abuse of assessment procedures;
- capture any patterns of migrant behaviour early which cause concern;
- address possible weaknesses in their processes which cause those patterns; and
- monitor compliance with immigration rules

Once licensed, a sponsor can apply for an allocation of Certificates of Sponsorship (CoS) or in the case of a Tier 4 sponsor an allocation of Confirmation of Acceptance of Studies (CAS)

Rating of sponsors

All sponsors are rated by UKBA. Under Tier 2 and Tier 5 (Temporary Workers) sponsors are given an 'A' or B rating. An 'A' rating is given to those employers who have the necessary systems in place to prevent abuse of the immigration rules. A 'B' rating is given to those employers whose processes aren't up to the necessary standards. B rated employers are given an action plan to help bring their processes up to the required standard. If they don't reach the required standard within the period of time given their licence is revoked.

Under Tier 4 sponsors are given an 'A' rating or Highly Trusted Status (HTS). The A rating is a transitional rating that lasts for 12 months from the date a licence is first granted. Once a sponsor has established a good record of performance with UKBA and has proved that they can meet all of their sponsor duties they must then apply for HTS.

What is a Certificate of Sponsorship / Confirmation of Acceptance of Studies (CAS)?

A CoS/CAS is a virtual document which contains a unique reference number (URN) which the sponsor issues to the migrant they wish to sponsor to enable them to apply for Entry Clearance or leave to remain.

An individual who wishes to apply under a sponsored route must have both a sponsor and a Certificate of Sponsorship/Confirmation of Acceptance of Studies. The URN links to a database record which provides details of the work or course they are being sponsored to do.

English Language Requirements

Requiring migrants to speak English is a key part of the Government's immigration policy. The ability to speak English well helps migrants to succeed in the UK labour market and assists in integration.

The level of English required will vary according to which category of the PBS the applicant has made the application under, which will be made clear in the Rules/Appendix and the date their application was considered.

Migrants can demonstrate their ability to speak English to the required standard by:

- proving that they've passed a test in English equivalent to the appropriate level
- proving that they are a national of a majority English speaking country
- proving that they've taken a degree (equivalent to UK bachelor's degree or above) taught in English (verified using UK NARIC date)

Note: If a migrant has met the English Language requirement once in any application, they will never need to provide this in subsequent applications. There are also some exemptions for intra-company transfers and transitional arrangements for migrants who were previously in certain categories.

If a CAS was assigned on or after 21st April 2011 the applicant may be refused leave to enter if they cannot speak English without the assistance of an interpreter. Students arriving at port will have to demonstrate their ability to speak English on arrival. This will not consist of any form of test instead they will be asked a series of questions on arrival.

If they are unable to demonstrate this they will have their visa cancelled under paragraph 321A.

The only exception to this is in the case of gifted students attending a Higher Education Institution who will carry a letter from their sponsor explaining their status. Gifted students are exempt from the English language requirement. Students will be assessed whether or not the student can speak English without an interpreter only by following the normal line of questioning (they will not be given any form of test).

Maintenance:

Migrants must demonstrate that they have sufficient funds to support themselves and any dependants for their entire stay in the UK without recourse to public funds. The level of maintenance required depends on the tier a migrant applies under.

Note: "A" rated sponsors can certify maintenance provided they state this on the CoS (this means the CoS states that they will maintain the applicant for the first month of employment).

The main issues to be aware of in PBS cases:

Date of application

There have been frequent changes to the PBS immigration rules. As a consequence when preparing for a PBS appeal it is important to ascertain the date the application was made in

order to identify the correct version of the immigration rule which the application was considered under.

Interim Caps and annual limits

Some of the PBS tiers are subject to interim limits and annual caps. It will be clear from the immigration rules if this is the case. These limits are normally set out in Appendix A, with the exception of the Youth Mobility Scheme, whose limits are set out in Appendix G.

The "near-miss" principle

The nature of PBS means that it is possible for applicants to come close to meeting a particular requirement, but just miss out. For example, they may miss the level of funds needed by £1, or apply using a certificate of sponsorship that is one day past its validity date.

The recent judgment in **Miah & Ors v Secretary of State for the Home Department [2012] EWCA Civ 261** definitively rejected the principle that cases should succeed on "near miss" grounds. The court stated: "A rule is a rule. The considerations to which Lord Bingham referred in *Huang* require rules to be treated as such. Moreover, once an apparently bright-line rule is regarded as subject to a Near-Miss penumbra, and a decision is made in favour of a near-miss applicant on that basis, another applicant will appear claiming to be a near miss to that near miss. There would be a steep slope away from predictable rules, the efficacy and utility of which would be undermined.

For these reasons, I would dismiss the appeal in relation to the Near-Miss argument. In my judgment, there is no Near-Miss principle applicable to the Immigration Rules."

Pankina

When presenting a PBS appeal be aware of the judgement in **Secretary of State for the Home Department v Pankina (2010) EWCA Civ 719**.

In Summary:

Prior to 23rd July 2010 the Immigration Rules only specified that the applicant must hold the required level of funds at the date of application, however, our own Tier 1 policy guidance stated that it should be held in the account for three months prior to the date of application. The Court of Appeal in Pankina found that an applicant only needs to demonstrate that they hold the required level of funds (for the entire family) at the closing balance on any one day during the one month period prior to the date of application. The court took the view that if the SoS wished applicants to hold funds for a specific period of time then this should have been stated in the immigration rules.

As a result of the judgement changes have been made to the Immigration Rules. The new rules state that an applicant must hold funds for a specific period of time.

Pankina is not only applicable to PBS but has a more general impact. Broadly speaking the SoS cannot place specific requirements to be met in guidance which are not also contained in the immigration rules. This does not, however, mean that every minor detail must be contained in the immigration rules. Subsequent cases have sought to expand the ruling in Pankina.

In July 2012, the Supreme Court allowed the appeal of **Alvi (2012 UKSC 33).** Mr Alvi had appealed after he was refused leave to remain in the UK (as an assistant physiotherapist, he was not on UKBA's approved list of skilled professions). He challenged the decision on the basis that they relevant policy had not been laid before Parliament as required by section 3(2) of the Immigration act 1972 and was therefore unlawful. As a consequence of the Supreme Court allowing the appeal, any decision where a refusal is based on requirements contained in guidance and not in the Immigration Rules is no longer lawful and should not be argued.

Entry Clearance Appeals and Administrative Reviews

NB: to trainer – appeals legislation i.e s82 is not covered until day 5 of this course. The trainer should use their judgment to determine whether to cover PBS appeals legislation at this stage.

The Immigration, Asylum and Nationality Act 2006 inserted s88A into the NIAA 2002. This section states that applicants applying for entry clearance under the PBS can only appeal on human rights and race relations grounds – they do not have a full right of appeal.

The commencement order that brought s88A into force, stated that s88A has effect "only so far as they relate to applications of a kind identified in immigration rules as requiring to be considered under a "Points Based System"'.

The case of **Abisoye (entry clearance appeal – Tier 2) [2012] UKUT 82 (IAC)** confirmed this and provides a helpful explanation, which is summarized in paragraph 12 *"Put simply, a person who has made a points-based application for entry clearance whose application has been refused only has a limited right of appeal, that limited right of appeal being on race discrimination or human rights grounds."*

Note to trainer, the below extract from Abisoye comprehensively explains the relevant pieces of legislation (it is unlikely that you will need to go into this level of detail with delegates):

> "88A Entry clearance
>
> (1) A person may not appeal under section 82(1) against refusal of an application for entry clearance unless the application was made for the purpose of—
>
> (a) visiting a person of a class or description prescribed by regulations for the purpose of this subsection, or
>
> (b) entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.
>
> (2) Regulations under subsection (1) may, in particular—
>
> (a) make provision by reference to whether the applicant is a member of the family (within such meaning as the regulations may assign) of the person he seeks to visit;
>
> (b) provide for the determination of whether one person is dependent on another;
>
> (c) make provision by reference to the circumstances of the applicant, of the person whom the applicant seeks to visit or on whom he depends, or of both (and the regulations may, in particular, include provision by reference to—

(i) whether or not a person is lawfully settled in the United Kingdom within such meaning as the regulations may assign;
(ii) the duration of two individuals' residence together);

(d) make provision by reference to an applicant's purpose in entering as a dependant;
(e) make provision by reference to immigration rules;
(f) confer a discretion.

(3) Subsection (1)—

(a) does not prevent the bringing of an appeal on either or both of the grounds referred to in section 84(1)(b) and (c), and
(b) is without prejudice to the effect of section 88 in relation to an appeal under section 82(1) against refusal of entry clearance."

10. Section 88A is an amendment to the 2002 Act introduced by the Immigration, Asylum and Nationality Act 2006, section 4(1). It was brought into force by the Immigration, Asylum and Nationality Act 2006 (Commencement No.8 and Transitional and Saving Provisions) Order 2008 ('the Commencement Order') by virtue of article 3 of that Order. This states that section 4 (entry clearance) of the 2006 Act shall come into force on 1 April 2008. Article 4 of the Order states as follows:

"**Saving and Transitional Provision**

4. Notwithstanding the commencement of section 4 of the 2006 Act and the substitution of section 88A of the 2002 Act and section 23 of the 1999 Act, section 4(1) (appeals: entry clearance) and section 4(2) of the 2006 Act (monitoring refusals of entry clearance) shall have effect only so far as they relate to applications of a kind identified in immigration rules as requiring to be considered under a "Points Based System"."

11. Thus, the limitation under section 88A of the 2002 Act on entry clearance appeals is confined to applications under the Points-Based System.

12. However, as can be seen above, section 88A(3) of the 2002 Act provides that grounds of appeal in terms of race discrimination and human rights are available. Put simply, a person who has made a points-based application for entry clearance whose application has been refused only has a limited right of appeal, that limited right of appeal being on race discrimination or human rights grounds. That, it seems to me, is precisely the situation which prevails in respect of the appellants here.

Applicants can however request that their decision be 'administratively reviewed'. Administrative Review is the mechanism for reviewing refusal decisions made under the PBS where an applicant believes an error has been made in the decision. It is free of charge. Administrative Review is an entitlement but an applicant must make a request for review. Their request must be made within 28 days from the date they receive the refusal notice. Administrative Review is a non-statutory scheme; that is there is no legislation setting out what it covers or who is eligible to apply. The review is conducted by an ECM. The ECM will check that:
• points have been correctly awarded; and
• documents have been correctly assessed; and
• verification checks have been properly carried out.

An applicant cannot submit new evidence with their request for review; unless it relates to paras 320 (7A) or 320 (7B) of the Immigration Rules – the general grounds for refusal.

Dependents

Dependents of PBS migrants are considered under para 319A – a completely different section of the rules to PBS migrants.

There are 2 key points to remember with regard to dependents:

- Dependents applying for ILR must have sufficient knowledge of the English language. This is judged by reference to paras 33B-33F.
- Dependents applying for entry clearance have a full right of appeal by virtue of s88A (1)(b) of the 2002 Act.

Key documents and issues to consider when preparing for a PBS appeal:

Establish the following:

- Which Tier and sub-category the appellant applied under
- The date the appellant's application was considered
- Which rule and version the appellant's application was considered under
- Why the appellant's application was refused
- The appellant's grounds of appeal
- What evidence the appellant submitted in support of his application
- Whether he has submitted new evidence since his application was refused and whether that evidence is admissible under s85A.
- Whether there is any relevant case law concerning the issues raised by the appellant's case

You must ensure you have the following documents:

- The appellant's application form
- the documentary evidence submitted by the appellant
- The refusal letter
- The appellant's grounds of appeal
- The version of the immigration rule the appellant's application was considered under
- UKBA guidance relevant to the appellant's case
- Case law relevant to the appellant's case

PBS Case Study

The applicant is a national of Turkey who has just completed a 3-year degree in Law at the University of Warwick. He would like to remain at The University of Warwick in order to complete their 1-year Legal Practice Course. The University of Warwick has Highly Trusted Sponsor status. The applicant has a Confirmation of Acceptance of Study from the university. The course fees are £9,900 p.a. The applicant has provided bank statements which show a balance of £6500 as of the date of application. Those funds have been in the applicant's account for 26 days.

Q1. Which tier is the applicant applying under?
A. Tier 4
Q2. Which is the relevant rule?
A 245ZX
Q3. Does the applicant have the requisite number of points?
A. No.

Paragraph 245ZX states that an applicant must have 30 points under paragraphs 113-120 of Appendix A. The applicant *has* a CAS so he therefore has 30 points. However, ask trainees to note paragraphs 116-120A of Appendix A.

Paragraph 245ZX also states that an applicant must have 10 points from paragraphs 10-14 of Appendix C. The applicant wishes to study outside of London so according to the table in paragraph 11 he must confirm (if his sponsor has highly trusted status) and show if necessary that he has funds amounting to the full course fees for the first academic year of the course, plus *£800* for each month of the course up to a maximum of two months. The applicant therefore must have funds to the value of £10,600 (£9,900 for the first year of the course and 2 x £800).

Additionally, 1A (c) of Appendix C states that the applicant must have had the funds for a consecutive period of 28-days. This applicant has only had his funds for 26 days.

NB: "Established presence" is defined in paragraph 14 of Appendix C:

> "14. An applicant will have an established presence studying in the UK if the applicant has current entry clearance, leave to enter or leave to remain as a Tier 4 migrant, Student or as a Postgraduate Doctor or Dentist and at the date of application:
>
> (i) has finished a single course that was at least six months long within the applicant's last period of entry clearance, leave to enter or leave to remain, or
>
> (ii) is applying for continued study on a single course where the applicant has completed at least six months of that course."

General grounds for refusal

In addition to being refused under the immigration rule that the application was made under, if there is a general ground that applies, the application may fail under that too;

Paragraph 320 entry clearance
Paragraph 321 & 321A on entry

Paragraph 322 after entry

The rules specify which are mandatory refusals and which are discretionary, for example:

320(1)-(7c) “grounds on which entry clearance or leave to enter the UK is to be refused”

320(8)-(21) “grounds on which entry clearance or leave to enter the UK should normally be refused”

Trainer to talk through what may fall under a general ground for refusal i.e. using forged documents, deception, inability to establish identity etc

320 (7B) bars an application being made if someone has previously overstayed, breached a condition of their leave, was an illegal entrant or used deception for a period of 1, 5 or 10 years (draw attention to exceptions at 7C).

Deception – when referring to deception under the rules, it must have been deliberate by the applicant, as defined in para 6. Failing to disclose a material fact is also classified as ‘Deception’. It follows that such a failure also requires dishonesty on the part of the applicant, or by someone acting on their behalf.

Ozhogina and Tarasova (deception within para 320(7B) – nannies) Russia [2011] UKUT 00197 (IAC)

Where the respondent relies on paragraph 320(7B) (d) to refuse an application for entry clearance because of a breach of the UK’s immigration laws by using ‘Deception in an application for entry clearance’ it is necessary to show that a false statement was deliberately made for the purpose of securing an advantage in immigration terms.

Khaliq (entry clearance – para 321) Pakistan [2011] UKUT 00350(IAC)

A person who has entry clearance that, under the provisions of the Immigration (Leave to Enter and Remain) Order 2000, takes effect as leave to enter, does not on arrival in the United Kingdom “seek” leave to enter, and paragraph 321 therefore does not apply to him. Paragraph 321A does, but only if the circumstances set out in that paragraph can be shown to exist in his case.

Be aware that the general grounds for refusal do not apply to Appendix FM. Instead, the ‘suitability requirements’ contained within Appendix FM perform a similar role.

Q – Any questions?

Day Two

Q Any questions from yesterday? Test trainees on what they learned.

Burden of proof:

Q: Who is the burden of proof on? Appellant / HO?

"He who asserts must prove". Therefore the appellant will in most cases be asserting that they meet the requirements of the rule. The burden is on them.

Q: When might the burden be on us?

Allegations of forgery. If we make an assertion that a document is a forgery then the burden shifts to us and we need to provide evidence, such as a forgery report, to meet this burden.

If no evidence has been provided, then you will not be able to meet the burden in court.

NB: to trainer: documents will be covered in detail later on in the course.

Upon whom is the burden of proof when raising a general ground for refusal e.g. under paragraph 320?

There is settled caselaw that the burden of proof is on UKBA when a refusal is taking place on these grounds– **JC (Part 9, HC395, burden of proof) China [2007] UKAIT 00027.**

Standard of Proof

Civil standard of proof – Balance of probabilities

Relevant Date:

Decisions Prior to 01/04/2003 (this is the date the 2002 Act commenced) – date of decision for all non-asylum cases

After 01/04/2003, Date of decision remains relevant in entry clearance cases, but for in country cases it is the date of hearing.

Section 85 (4) of the NIAA 2002 act:

"On an appeal under section 82(1) or 83(2) against a decision an adjudicator may consider evidence about any matter which he thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision".

AS (Afghanistan) and NV (Sri Lanka) vs SSHD [2009] EWCA Civ 1076

(**NB:** This case isn't on the handout. It is contained in the notes for the benefit of the trainers. Judges tend to be reluctant to consider matters which have not been considered by the SoS therefore this case isn't the problem it was initially viewed as being. Use your judgment to determine whether it is necessary to cover this case.)

The case of AS and NV considered what this means. (Take the trainees to the relevant parts of the legislation to explain). When an applicant is refused they may be served with a "one-

stop notice" under S120 of this act. This notice requires them to state any additional ground for the application.

The majority found that the effect of this notice is that the appeal can cover not only any ground before the SSHD or Immigration Officer when he made the decision under appeal, but also any ground raised in the one-stop notice, even if they had not been the subject of any decision by the SSHD and do not relate to the decision under appeal.

The reference to the "decision" in the legislation has been taken to mean the general decision under S82, not the specific decision under the immigration rules.

The effect of this is that someone can raise a new application before the Judge, making the IAC the primary decision maker.

Our policy position is that any fresh applications which are raised in a S120 notice must still fall within the immigration rules. You should remind the Judge that only the SSHD has the power to depart from these rules, Judges cannot grant leave outside of the rules or discretionary leave as this involves departing from the rules. .

If raised, you will need to consider the new grounds at appeal. The rules say that somebody "may" be granted if they meet all of the pre-requisites. The discretion includes the factors listed in the general grounds for refusal. If there is a general ground that applies, you should raise this as a preliminary issue and you will need to deal with this by questioning the appellant. Remind the Judge that only if they are satisfied that all relevant rules are met should they consider granting.

AS arguably does not apply to S83 cases as this is limited to asylum only. And S120(1)(b) only applies to s82 immigration decisions.

AS also only applies to cases in which we've served a one-stop notice (and we don't do that in every case).

Entry clearance – Relevant date:

Section 85 (5) 2002 Act:

"But in relation to an appeal under section 82 (1) against refusal of entry clearance or refusal of a certificate of entitlement under section 10 –

(a) subsection (4) shall not apply
(b) the adjudicator may consider only the circumstances appertaining at the time of the decision to refuse.

There are 2 cases to be aware of. The first considers the terms and defines 'appertaining to',

The second looks specifically at whether the legislation is compatible with article 8 and whether it is correct that there should be a distinction between out of country and in country cases.

DR (Morocco)* [2005] UKAIT 00038

- Section 85(5) of the 2002 Act does not exclude all evidence after the date of decision – BUT the tribunal can only consider circumstances appertaining at the date of decision
- This can be demonstrated by subsequent actions / evidence that sheds light on the position at the date of decision

- Judges cannot consider evidence that shows the position has changed and that there is now an intention that was subsequently lacking
- Essentially the evidence needs to be considered only if it concerns a matter existing AT the date of decision but not a new matter arising after the date of decision

AS (Somalia) (FC) and another (appellants) v SSHD (Respondent) [2009] UKHL 32

With entry clearance cases, if human rights grounds are raised, the hearing will consider only the human rights circumstances as at the date of decision – not the date of hearing.

The court found that this position was not incompatible with the convention, and it was open for the appellant to simply make a fresh application to the ECO if their circumstances were changed.

"contrary to Mr Gill's submissions, I consider that there is good reason for the distinction that this subsection draws between decisions on entry clearance and decisions on leave to enter. Where a change of circumstances is alleged by someone who is outside the jurisdiction, the entry clearance officer will often be best placed to evaluate the effect of this….in such circumstances, it is not illogical to require a fresh application for entry clearance to be made"

"Thus the provisions of section 85(4) and (5) are neither irrational nor calculated to result in unjustified delay in the consideration…section 85(5) of the 2002 Act is not incompatible with the convention" (paras 9 and 10)

EXAMPLE:

The appellant has applied for leave to enter as a visitor, he will pay for his own flights but his sponsor will pay for maintenance whilst he is in the UK.

His sponsor is his Uncle and has provided a bank account which has £2.30 in it. The application was refused on the basis of lack of funds.

At the appeal, the sponsor produces evidence to show that 1 week after the refusal, he won the lottery and now has £5million in his bank account. Can this evidence be considered?

A: NO

In cases where there has been a significant change of circumstances, it may be better for the appellant to withdraw his appeal and re-apply.

PBS

In in-country cases, the Judge can consider the circumstances at the time of the hearing. However, following the introduction of Section 19 of the 2007 Act there has been a slight change to this in PBS cases only. This came into force on 23rd May 2011.

Section 19 inserts section 85A following section 85(5) (extracts in delegates handouts). Under section 85A the only evidence that the Judge can consider is that which was submitted in support of, and at the time of making the application to which the immigration decision relates. However, this only applies to PBS appeals, in all other in-country applies the relevant date is the date of the hearing.

There are a small number of exceptions to this general rule. New evidence, that was not presented prior to the date of decision, is allowed at the appeal stage only in the following circumstances:

- Where it relates to grounds of appeal under sections 84 (b), (c), (d) or (g) of the Nationality, Immigration and Asylum Act 2002 (race relations, human rights, EEA or asylum grounds).
- Where it is produced to prove that a document upon which the appellant is relying is genuine or valid (this allows appellants to rebut any allegations of forgery).
- Where it is in connection with the Secretary of State's reliance on a discretion under the Immigration Rules, or compliance with a requirement of the Immigration Rules on grounds unrelated to the acquisition of points under the Points Based System.

In summary:

In answer to the question "What is the relevant date?" the answer is 1 of 3 things:

- **Date of decision** (all entry clearance cases regardless as to when the decision was made, and all other non-asylum decisions made prior to 1/4/2003)
- **Date of hearing** (all in-country cases decided on or after 1/4/03 with the exception of in-country PBS cases).
- **Date of application** (all in-country PBS cases).

BUNDLES

What documents / evidence can be expected in a bundle?

Entry Clearance*:*

- Explanatory statement.
- VAF.
- Any relevant documents that the appellant produced with the application.
- Interview (if one had taken place).
- Further documents including forgery reports if relevant.
- Refusal letter.
- Grounds of Appeal.

In-Country:

- Application form.
- Supporting documents.
- Request for further information.
- Any further information produced (either by appellant or HO).
- IV record (rarely).
- Previous applications (if relevant).
- Notice of decision.
- Reasons for refusal.
- Grounds of appeal.

MH (Respondent's bundle: documents not provided) Pakistan [2010] UKUT 168 (IAC)

"The requirements of rule 13 are mandatory. Their intention is clear: it is to enable the Appellant to know the case he has to meet, and the Tribunal to have the material upon which the case can be judged. If there are documents relating to the detection of forgery which

ought in the public interest not to be disclosed, the procedure under s. 108 of the 2002 Act is available, as also indicated by rule 51(7)…but it seems to us that, because the documents mentioned in subparagraph (a) are essentially the statement of the Respondent's case, even in a case where the obligation to disclose a document arises from the fact that it is "referred to in a document mentioned in subparagraph (a)", the Tribunal is entitled to conclude that a document not furnished under rule 13 is not a document upon which the Respondent relies; and that if there is reference to it in the Notice of, or Reasons for Refusal, the Tribunal is entitled to conclude that that reference no longer forms part of the Respondent's case".

Cvetkovs (visa – no file produced – directions) Latvia [2011] UKUT 00212 (IAC)

1. Where a visit visa application is refused because the Visa Officer is not satisfied of the appellant's intentions as a result of only limited documents being produced and translated; and the respondent breaches Procedure Rules by failing to send documentation to the Tribunal, directions can be given indicating that unless the respondent complies with the rules it may be that the Tribunal will assume that the appeal is unopposed.

2. Where the respondent breaches Procedure Rules by failing to send documentation to the Tribunal, and the First-tier Tribunal issues a reasoned decision, based on the material before it, allowing the appeal, a challenge by the respondent based on sufficiency of reason is unlikely to prosper on an application for permission to appeal to the Upper Tribunal.

Any questions?

New Issues

Q – What would you do, if anything, if the refusal letter has only refused the application on intention to leave the UK, but when having a look through the papers you are not satisfied that the appellant meets the maintenance and accommodation criteria?

Kwok on Tong is a case from 1981 which states that the appellant has to satisfy all elements of the rule, even if there were areas that the entry clearance officer did not refuse the application on. Therefore we are able to raise at the beginning of the hearing new issues by relying on this case.

R v Immigration Appeal Tribunal ex parte Kwok on Tong

"I would, however, say that if, as happened in this case, at either appeal stage, a matter is either raised by whoever is acting on behalf if the Home Office or is considered by the Tribunal or adjudicator, which is not in the notice of refusal, then steps must be taken to ensure that the applicant or appellant has a proper opportunity of dealing with this point. Sometimes – and it is not this case – it may transpire that because the matter was not referred to in the notice of refusal the applicant will not have come ready to meet the point. In such circumstances it may be that he will need the opportunity either to consider whether to call further evidence or to consider further argument which he had not had the opportunity to think about. Either of these may require an adjournment….."

As can be seen from the above excerpt, in the case of Kwok on Tong, the judgement is clear. A matter can be raised at the appeal which was not in the refusal letter, this can be done by the Judge them self, or by "whoever is acting on behalf of the Home Office".

What is important is that the appellant is given the opportunity to respond to the new issue. It may be that an adjournment is necessary to allow the appellant the opportunity to prepare,

however if the adjournment could not assist then this should be resisted. If the information that you are seeking to rely on to raise the new issue was available at the time of the decision, even if not included in the refusal letter, then you may have grounds to resist an adjournment request from the representative.

Q – In what circumstances would an adjournment not assist?

Due to the age of the case, some Judges questioned whether it was still good law – in 2005 **RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039** confirmed that Kwok on Tong is still good law and that the appellant has to show that they meet the whole of the rule.

Family Visitors

Previously, the appeal right for family visitors was provided by s90 of the 2002 Act and the Immigration Appeals (Family Visitor) Regulations 2003. These have been replaced (as of the 9th July 2012) by s88A of the 2002 Act and the Immigration Appeals (Family Visitor) Regulations 2012.

(Note to trainer: The Immigration, Asylum and Nationality act 2006 (Commencement No. 8 and Transitional and Saving Provisions) (Amendment)_Order 2012 brought into force s88A for family visitors; it is unlikely that you will need to refer to this Order during training)

Only certain categories of people have a full right of appeal against refusal of an application for entry clearance. This is set out in s88A:

88A. Entry clearance

1) A person may not appeal under section 82(1) against refusal of an application for entry clearance unless the application was made for the purpose of-
    a. Visiting a person of a class or description prescribed by regulations for the purpose of this subsection, or
    b. Entering as the dependant of a person in circumstances prescribed by regulations for the purpose of this subsection.
    …

Refer delegates to the Family Visitor Regulations 2012. Paragraph 2 sets out the relationship that must exist between applicant and sponsor, in order for a full right of appeal to exist (if any delegates are familiar with the 2003 Family Visitor Regs, they will notice that this no longer extends to aunts, uncles or cousins).

Unlike the 2003 Regs, the 2012 Regs also require that the sponsor in the UK has settled status, asylum status or humanitarian protection status (2012 Regs, para 3).

RK ("Purpose" of family visit) Bangladesh [2006] UKAIT 00045

"In order to give rise to an appealable decision, the evidence must show that the purpose of a family visit was to visit a member of the applicant's family, as defined in the Immigration Appeals (Family Visitor) Regulations 2003. It cannot be assumed simply from the fact that a person falling within that definition lives in the United Kingdom that the purpose was to visit them"

An appellant needs to have declared the purpose for the visit on the VAF or in interview (see VAF in bundle. Section 5 allows the applicant to state the purpose of the visit). According to

RK, the appellant should declare the purpose of their visit. For example to visit their uncle. If at the appeal hearing the purpose has changed, then the appeal will have to be dismissed.

Ajakaiye (visitor appeals – right of appeal) Nigeria [2011] UKUT 00375 (IAC)

In family visitor appeals, the question whether there is a right of appeal depends on whether the application "was made" for the purpose of visiting a relative to which the applicant is related in one of the ways described at paragraph 2 of the Immigration Appeals (Family Visitor) Regulations 2003.

Ascertaining the purpose of the visit is primarily achieved by examining what the applicant said in the visit visa application form, although, as presently drafted, the forms may not provide sufficient opportunity to identify all relevant matters.

In the event of ambiguity as to who is to be visited and whether they are a qualifying relative, regard may be had to extraneous evidence.

Visit visa exercise

EEA NATIONALS

Explain that this is an introductory session on the EEA and the Regulations. There is an EEA module available that is more comprehensive. Key caselaw and the EEA countries are detailed in packs.

NB: to trainer – if trainees have questions about what public funds EEA nationals are entitled to direct them to the ECI entitled 'Public funds'.

What is the European Economic Area?

The European Economic Area consists of the members of the European Union along with the remaining members of the former European Free Trade Association (EFTA) (Norway, Iceland & Liechtenstein). There is also a bilateral agreement between the EEA and Switzerland.

(The EFTA was established on 03/05/1960 as an alternative for European states that were not allowed or did not wish to join the European Economic Community (EEC); now known as the EU. It established a free trade area amongst its member states in 1960.

What is the impact of the EEA agreement?

The terms of the EEA Agreement (1992) mean that nationals of EEA countries enjoy the same rights of freedom of movement as nationals of EU states.

The rights of EEA nationals are not governed by the Immigration Rules HC395 (although they can make an application under the rules if they so wish), and **are not** granted Leave to Enter or Remain like other nationals.

See paragraph 5 HC395:

"Save where expressly indicated, these Rules do not apply to those persons who are entitled to enter or remain in the UK by virtue of the provisions of the 2006 EEA Regulations. But any person who is not entitled to rely on the provisions of those Regulations is covered by these Rules".

What countries are in the EEA?

EU Members

Austria	Belgium	Bulgaria	Cyprus
Czech Republic	Denmark	Estonia	Finland
France	Germany	Greece	Hungary
Italy	Latvia	Lithuania	Luxembourg
Malta	Netherlands	Poland	Portugal
Rep of Ireland	Romania	Slovakia	Slovenia
Spain	Sweden	UK	Croatia

(Bulgaria & Romania joined January 2007)

EEA but not EU members:

Iceland
Liechtenstein
Norway

Non EEA state but with Agreement:

Switzerland

European Directive 2004/38/EC (commonly referred to as the Citizens' Directive)

Q What is a European Directive?

A directive is a legislative act of the European Union which requires member states to achieve a particular result without dictating the means of achieving that result. Directives normally leave member states with a certain amount of leeway as to the exact rules to be adopted.

The Citizens' Directive is the latest directive which deals with the movement of EEA nationals.

The Immigration (European Economic Area) Regulations 2006 (as amended)

The EEA Regulations 2006 (as amended) are our interpretation of the Directive. Each member state has interpreted the Directive and produced their own Regulations. It is through our EEA Regulations that applications are made in the UK.

The Regulations detail the rights of EEA nationals and their family members in the UK. They have been drawn up by consolidating the various European Treaties, regulations, decisions, directives and rulings from the European Court of Justice to reflect the position and rights of EEA nationals.

EEA nationals can exercise what is known as their treaty rights without ever applying to the Home Office to obtain documentation confirming their rights. They do not need to have any grant of status or permission to exercise their rights.

Q If an EEA national does not need any documentation to confirm their status, why do you think they make applications and we see them at appeal?

Some EEA nationals and their family members do wish to have documents confirming their rights. Having documentation makes things easier for them, for example for employment purposes. If they apply to us for a document and we refuse a document they may have a right of appeal against our decision. At the appeal you will defend our decision to refuse them a document.

Amendments to the Regulations

When preparing an EEA case it's vitally important that you read the amendments to the regulations (The Immigration (EEA) (Amendment) Regulations 2009; the Immigration (EEA) (Amendment) Regulations 2011 and the Immigration (EEA) (Amendment) Regulations 2012) as well as the Regulations themselves.

Using the Regulations go through the following:

Regulation 11 – Right of admission to the UK

An EEA national must be admitted to the UK if he produces a passport or ID card issued by an EEA state. There are no other requirements.

Regulation 13 – Initial right of residence.

Any EEA national can enter the UK for a period of 3 months without having to do anything i.e. work, study etc. The only criteria laid down at the initial right of residence stage is that the EEA national or their third country relatives must not be a burden on the social security system of the United Kingdom (see Reg 13 (3) (b)). (**NB: to trainer -** we cover what it means to be a burden when dealing with self-sufficient persons below.)

Regulation 14 – Extended right of residence

Following the initial 3 month period, an EEA national may continue to reside in the UK if they qualify under regulation 14. This regulation explains that an EEA national may extend the initial right of residence for as long as they are a qualified person.

Regulation 6 "Qualified person"

To be a qualified person they need to be an EEA national, and one of the following (regulation 6 (1)):

a. Jobseeker;
b. Worker;
c. Self-employed person;
d. Self-sufficient person;
e. Student

If an EEA national is a qualified person they are said to be 'exercising their treaty rights'.

Q Can a UK national ever be said to be exercising their treaty rights <u>in the UK</u>?

No. The Directive only applies to Union citizens who move to or reside in a member state other than that of which they are a national. This is reflected in Article 3(1) of the Directive.

Jobseeker

Reg 6 (4) defines what a job seeker is.

They must establish that they are seeking work, and that they have a genuine chance of being engaged.

Q How could a person demonstrate that they are seeking work?

They would produce evidence that they've registered with a local employment agency; evidence that they've applied for jobs etc.

Q How could a person demonstrate that they have a genuine chance of being engaged?

By showing that their qualifications and experience match up with the types of jobs they are applying for. As a crude example, a person with qualifications and experience in IT does not have a genuine chance of being engaged as a surgeon.

Our policy guidance states that a person should have a genuine chance of being engaged within 6 months. Although, case law has taken the view that it is possible for a person to be a job-seeker for longer than 6-months as long as they can continue to show they have a genuine chance of being engaged in employment. Each case should be assessed on its individual merits.

Worker

(NB: to trainer: It's not necessary to give delegates a formal definition of a worker. Take the view that it's self-explanatory.)

Q Can a person work part-time and still be classed as a worker?

Yes. The case of **D.M. Levin v Staatssecretaris van Justitie. [1982] EUECJ R-53/81 (23 March 1982)** confirms this.

"Someone undertaking part time work can be considered a worker providing that the work is genuine and effective and not purely marginal and ancillary."

Q If a person is supplementing their income from the public purse can they still be a worker?

Yes. The case of **R. H. Kempf v Staatssecretaris van Justitie. [1986] EUECJ R-139/85 (3 June 1986)** confirms this.

"Supplementing income from the public purse does not stop a person being a worker."

Ask delegates to read reg 6(2). This explains the circumstances in which a person can lose their job but still be classed as a worker.

Self-employed

Ask delegates to read the definition of self-employed person contained in reg 4(1)(b).

The court in the case of **A. J. M. van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen. [1986] EUECJ R-300/84 (23 October 1986)** defined self-employment as:

"Genuine and effective economic activity carried out outside of a relationship of subordination."

Self-sufficient person

Ask delegates to read the definition of self-sufficient person contained in reg 4(1)(c) and 4(4).

Sufficient resources not to become a burden on the social assistance system means that a person has at least the amount that a person in receipt of benefits has. The 'test' has been relaxed somewhat following the 2011 amendments – refer delegates to paragraph 2 of the amendments.

When deciding if an EEA national and their family members have sufficient resources not to become a burden on the social assistance system you must first check if their resources:

- exceed the maximum level of resources which a UK national and their family members can have so that they qualify for social assistance under the UK benefit system.

In most cases it will be clear whether or not an applicant exceeds the maximum level of resources which a UK national and their family members can have so that they qualify for social assistance. They will exceed this level if they provide documents showing they have enough resources to cover their essential outgoings. For example the applicant can provide evidence of resources by providing bank statements; evidence of pension payments

If an EEA national and their family member's resources do not exceed the maximum levels of resources which a UK national and their family members can have so that they qualify for social assistance, you must take into account their personal situation to see if their resources are nonetheless sufficient on the facts of the case. For example, you will consider their financial commitments such as their rent; mortgage loans etc.

There is no formal definition of comprehensive sickness insurance. Guidance on which is considered comprehensive sickness insurance can be found in chapter 4 and chapter 6 of the ECI's. As of June 2011, comprehensive sickness insurance includes a European Health insurance card (EHIC) issued by a member state other than the UK. .

Student

Ask delegates to read reg 4(1)(d) and 4(4) and paragraph 2 of the 2012 amendments.

The reference to the Department for Education and Skills has been removed.

A person is exercising treaty rights as a student if they are studying at either a publicly funded educational establishment or a privately funded educational establishment recognized by the Secretary of State as an establishment that is accredited to provide such courses. Establishments that have been granted a sponsor license under Tier 4 are acceptable. In addition, there are other approved lists which case workers in Euro case

work use so if in doubt as to whether an establishment is recognized please speak to the decision-maker.

Students also have to show that they have sufficient resources not to become a burden on the social assistance system of the UK and that they have comprehensive sickness cover. Regulation 4(1)(d)(iii) states that a student can simply make a 'declaration' that they have sufficient funds without having to provide additional evidence of those funds.

Q Do you think it is possible for a 3 year old EEA national to show that they are exercising treaty rights?

Yes, it is possible. They (or rather their parents on their behalf) will assert that they are 'self-sufficient' by virtue of the fact that their parents provide for them financially and that they have comprehensive sickness insurance. This is because of a judgment called **Chen and Others (Free movement of persons) [2004] EUECJ C-200/02 (19 October 2004)** **(NB: to trainer** – there is no need to discuss the facts of Chen or why the court arrived at that decision.) You will deal with a number of these cases. Primary carers of EEA self-sufficient children do not come within the provisions of regulation 7 as a direct family member as they are not 'dependent' on the EEA child (this will make more sense when we cover regulation 7 below). They do, however, still have a directly enforceable treaty right under EU law to reside in the UK in order to facilitate their child's right to reside. Provision has therefore been made in regulation 15A for the primary carer and any dependent children to have a derivative right to reside(this can be found in the 2012 amendments).We will cover derivative rights in brief later.

Family members

If an EEA national is exercising their treaty rights their family members can join them if certain criteria is met.

The rights of family members are outlined in regulation 7. Extended family members are provided for in regulation 8.

Regulation 7

Family members falling within reg 7(1)(a); (b) and (c) are often referred to as 'core 'or 'direct' family members.

Ask delegates to read reg 7.

Q Do unmarried partners fall within reg 7?

No

Q Do brothers and sisters fall within reg 7?

No

Q Do aunts and uncles fall within reg 7?

No

Q Do cousins fall within reg 7?

No

Reg 7 concerns the spouses and civil partners of EEA nationals and family members in an up and down line i.e. the children and grandchildren of the EEA national and their spouse/civil partner who are either under 21 or dependent on the EEA national and their spouse/civil partner and the parents and grandparents of the EEA national their spouse/civil partner who are dependent on either the EEA national or their spouse/civil partner.

For those family members who have to show that they are dependent the test for dependency stems from the case of **Jia (Free movement of persons) [2006] EUECJ C-1/05 (27 April 2006).**

There is a 3 pronged test that they must meet. The dependency must be:

- Financial
- Evidence
- To meet their essential needs (not in order to have a certain level of income)

Q What are your essential needs?

Food; clothing; shelter etc.

Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources.

There is no need to determine the reasons for recourse to the financial support provided by the EEA national or to consider whether the applicant is able to support him/herself by taking up paid employment. The dependency can be through choice rather than necessity e.g. the appellant may be able to work but chooses not to (European Casework Instruction 5.1.2)

The dependency may only have arisen since the appellant came to the UK e.g. the appellant may have worked in the country of origin (no dependency) but then come to the UK and become dependant on the EEA national The person does not need to be living or have lived in an EEA state which the EEA national sponsor also lives or has lived (**Pedro v SSWP [2009] EWCA Civ 1358)**.

Regulation 8

Regulation 8 concerns extended family members (or other family members (OFMs) as they're sometimes referred to in case law).

NB: to trainer – parts of reg 8(2)(a) has been amended by the 2011 and the 2012 (no 2) amendments. Below is how it should read with the amendments. The delegates will have to read the version in Phelan and then read the 2011 and 2012 (no 2) amendments.

8 (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—

(a) the person is residing in a country other than the UK and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

- Persons wishing to take advantage of reg 8(2) must show that they meet or met part (a), **and** that they meet **either** (b) **or** (c). So, they must satisfy either (a) and (b) or (a) and (c).

- Part (b) is for persons who are outside of the UK.
- Part (c) is for persons who are already in the UK.

- A person must show they are **either** dependent on the EEA national **or** that they are a member of the EEA national's household. They don't have to show both.

- The test for dependency is the test that is outlined in **Jia**.

8(3) Personal care on serious health grounds

- This applies only where a non EEA national 'strictly requires' the personal care of an EEA national on 'serious health grounds'.
- The case of **TR (Reg 8(3) EEA Regs 2006) Sri Lanka** found that the word 'serious' requires health grounds to be well beyond ordinary ill health. They stated that detailed medical evidence would be required before this could be ascertained.
- As Personal Care is not defined in the regulations, they looked to information produced by the Department of Health. The Regulation of Care (Scotland) Act 2001 provides a statutory definition which states: "Personal care means care which relates to the day to day physical tasks and needs of the person cared for (as for example, but without prejudice to that generality, to eating and washing) and to mental processes related to those tasks (i.e. remembering to eat and wash)"

8(4) A relative who would meet the immigration rules for ILE /ILR as a dependent relative of the EEA national.

- If the non EEA national does not meet the other sub-paragraphs, they will need to show that they meet the immigration rules. Typically this will be the dependent relative rule contained in Appendix FM of HC 194. This contains a very stringent test.

8(5) Partner of the EEA national in a 'durable relationship'

- The term 'durable relationship' comes from Article 3 of the Directive. Previously UKBA's position was to apply the criteria outlined in the unmarried partner immigration rule (previously rule 295D, now Appendix FM of HC 194).
- The court in **YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062** considered whether this was the correct approach. They said this:

"…It would be wrong to say in this case…that the appellant could not be issued a residence card solely because he failed to meet the requirements of para 295D(I). At the same time, there is no requirement as to precisely how the extensive examination is to be done; at the most, via recital 6 of the directive…one can say it should take into account the family relationship with the EEA national...and ensure that the circumstances considered include (if

applicable) 'their financial or physical dependence on the Union citizen'. And in our view it would be wrong to make this more exacting a requirement than it is…..But the essential need is a simple one necessitating an examination in the round of the appellant's circumstances". [para 30]

However, current policy guidance states that the following conditions should normally be satisfied:

- The parties have been living together in a relationship akin to marriage which has subsisted for two years or more.
- The parties intend to live together permanently.
- The applicant and their partner must not be in a prohibited degree of relationship.
- Any previous marriage (or similar relationship) by either party has permanently broken down.

These conditions are similar to those which apply in respect of partners outlined in Appendix FM of HC 194 but there may be cases where notwithstanding that one or more of these points is not met UKBA may still satisfied that the parties are in a durable relationship e.g. a couple may have lived together in a relationship akin to marriage for only 1 year yet they have a child together; under those circumstances it would be difficult to argue that they are not in a durable relationship.

Regulation 9 – family members of UK nationals

We explained earlier that a fundamental theme running through EEA law is that a person can only be said to be exercising their treaty rights once they've crossed the border into another EEA state. This means that the family members of UK nationals where that UK national has never left the UK to exercise their treaty rights cannot benefit from the EEA Regulations. If they wish to enter the UK they must meet the immigration rules (which are a lot tougher than the EEA Regulations). However, regulation 9 gives some family members of UK nationals the right to reside in the UK under the EEA regulations in limited circumstances. Give delegates the opportunity to read reg 9. To note, upon their return to the UK, the UK national is not required to exercise treaty rights (ECJ case of Eind).

Regulation 15A – derivative rights

Some family members do not fall within either reg 7 or reg 8 e.g. non-EEA national parents of a self-sufficient EEA national child. They may however fall with reg 15A. Give delegates an opportunity to read reg 15A (in the 2012 (no1) and (no2) amendments).

Documents

We've already explained that there is no requirement for an EEA national to apply for a document to confirm their right to reside in the UK. The same is also true of their non-EEA national direct family members (reg 7 family members). A non-EEA national family member is more likely (than the EEA national) to want to obtain a document though. Extended family members (reg 8) do not have an automatic right to reside under the Regulations until they are issued with a document confirming that right.

- **Registration Certificates** are given to EEA nationals. An EEA national must satisfy reg 16 in order to obtain one.

- **EEA Family Permits** are issued to non-EEA family members who are outside the UK. It's the EEA version of entry clearance. Family members must show that they meet either reg 7 or reg 8. If they do, we then consider their application for a family permit under reg 12. Note that reg 12 has been amended by the paragraph 2(4) of the 2011 amendments. Reg 12(1)(b)(i) and (ii) have been deleted.

  It is important to note the distinction drawn between reg 7 family members and reg 8 family members under reg 12. If a person falls within reg 7 they **must** be issued with an EEA family permit if they apply for one. If a person falls within reg 8 we are not obliged to issue them with an EEA family permit. Note the use of the word **may** in reg 12(2). The overriding principle is whether the absence of the extended family member would prevent the EEA national from exercising his or her treaty rights i.e. by forcing them to leave the UK to care for a sick parent. This will determine whether we grant them a family permit.

- **Residence Cards** are issued to non-EEA national family members who are already in the UK. Family members must show that they meet either reg 7 or reg 8. If they do, we then consider their applications for a residence card under reg 17.

  Again, there is a distinction drawn between reg 7 family members and reg 8 family members.

- **Derivative Residence Cards** are issued to primary carers and their dependents who have a derivative right under reg 15A. A primary carer or dependent must show that they fall within reg 15A, if they do, we then consider their application for as document under reg 18A.

Other regulations

Regulation 10 - Family member who has Retained Right of residence

When an EEA national ceases to be a qualified person, their right to reside in the UK ceases too. This will usually mean that the rights of their family members to reside in the UK cease as well. However, regulation 10 outlines certain circumstances in which family members would retain a right of residence. Broadly speaking we're looking at circumstances in which the EEA national has died; has left the UK or their marriage/civil partnership with the family member has been terminated. Give delegates an opportunity to read reg 10.

Permanent Residence – Regulation 15

After 5 years continuous residence in accordance with the Regulations EEA nationals and their family members can apply for permanent residence. Once acquired a permanent right of residence is only lost by absence of over 2 years or other reasons of public policy or security. The right of residence is just that, a right. They do not have to have had any documentation as an EEA national as long as they can evidence that they have spent the previous 5 years as a qualified person that will be sufficient.

Regulations 26 / 27 - Appeals under the EEA regulations

It is possible for an individual to have rights of appeal under the EEA Regulations and under Section 82 of the 2002 Act either separately or at the same time.

In order to appeal under the 2006 regulations, the first thing that the appellant must do is to establish that they are entitled to such an appeal. This is done through producing identification to show that the EEA national is indeed an EEA national, and additionally, evidence that the family member is related in the necessary way to an EEA national.

Case studies 1 – 5 (trainers' copy available)

EEA deportation

NB: to trainer: This policy is currently under review.

Regulation 19(3)

This regulation gives the Secretary of State the power to deport EEA nationals.

Deportation is considered for EEA nationals if there has been a court recommendation or a custodial sentence of 24 months or more.

The Enforcement Instructions and Guidance, Chapter 12, 12.3 state that **"A person must have been convicted of a serious offence normally attracting a custodial sentence of 12 months or more where the conviction was for a drugs, sex or violent offence or in other cases where the sentence received was for 24 months or more."**

Before deciding whether to use our power to deport an EEA national we must consider the factors outlined in regulation 21.

Regulation 21

21(1) provides us with 3 grounds on which we can deport an EEA national:

Public Policy:

- Decisions taken on public policy grounds must take into account the conditions of regulation 21.

Public Security:

- Our guidance indicates that 'public security' implies terrorism, but the court in **LG (Italy) v SSHD [2008] EWCA Civ 190** disagreed and said this:

  "There is no reason to equate the term public security with that of national security…the words risk to the safety of the public or a section of the public seem to me reasonably consistent with the ordinary understanding of public security" [para 32].

Deportation under Public Health grounds:

Reg 21(7) detail the circumstances in which we can rely on this ground:

- A person may only be removed on public health grounds if s/he has a disease that has been listed by the World Health Organisation as having epidemic potential, or to which section 38 of the Public Health (Control of Disease) Act applies.

- We cannot remove someone on these grounds if the disease was contracted more than three months after arriving in the UK.

Once we've identified the grounds on which we wish to deport a person we must then consider reg 21 (5) and (6)

Reg 21 (5) and (6)

- In order to pursue a deportation, we have to show that the decision is proportionate. For example, instigating deportation action against a person who has committed a minor traffic offence would not be proportionate.

- We must show that the subject is a genuine, present and sufficiently serious threat to one of the fundamental interests of society.

- 21 (5) (d) states that we can't justify our decision by asserting that we wish to prevent a certain crime from being committed.

- 21(5) (e) states that a previous criminal conviction does not in itself justify the decision, however, it is possible that the seriousness of the crime committed will show a present threat, and equally if a past criminal record shows consistent and persistent law breaking, this could also indicate a present threat.

Deportation of someone with permanent residence under regulation 15:

Reg 21 (3)

- A person with the right to permanent residence can only be deported on serious grounds of public policy or public security.

- In order for a person so acquire permanent residence, the individual only has to show that they have been exercising their rights as a qualified person for at least 5 years under the regulations. It does not matter whether or not they have previously been given documentation to confirm their status.

- "Serious" is not defined in the Regulations, but it implies that there must be significantly stronger grounds for the deportation than would be the case for someone who did not have the right to permanent residence. Whether or not there are serious grounds justifying deportation is to be decided on a case-by-case basis.

Deportation of minors, or people with at least 10 years residence in the United Kingdom:

Reg 21 (4)

- A minor or person with at least ten years' continuous residence in the UK can only be deported on imperative grounds of public security.

- The regulations do not define imperative grounds of public security but the court in **Tsakouridis (European citizenship) [2010] EUECJ C-145/09 (23 November 2010)** gave guidance on the application of 'imperative grounds of public security'. They said the following should be considered:

    - The EEA national's degree of integration and absences form the UK.
    - The nature of the offence and the sentence imposed.
    - The risk posed to the public.
    - The propensity to reoffend.
    - Whether any measure short of deportation are sufficient.
    - The effect that deportation would have on a person who has become integrated into UK society and in particular the potential risk to the future social rehabilitation of the offender.

- The principles laid down in regulation 3 for calculating continuous residence do not apply to regulation 21(4)(a). The question of whether someone has ten years' continuous residence is therefore one of fact. The residence does not have to be in accordance with the EEA regulations (this was confirmed by the court in **LG & CC (EEA Regulations: residence; imprisonment; removal) Italy [2009] UKAIT 00024)** it is enough for someone to have accrued that level of time in the UK. The court in **HR (Portugal) vs SSHD EWCA Civ 371 [2009]** found that time spent in prison cannot count towards the period of continuous residence for the purpose of the regulations. They said:

"… "Residence" is presence in this country in the exercise of the rights and freedoms conferred by the Treaty. An EEA national who, having been convicted of a crime, is detained for a significant period in prison or other penal institution, is not resident in this country for the purposes of Article 28.3."

The case explains this further at paragraph 27:

"This conclusion avoids perverse consequences of interpretation that the European Parliament and the Council could not have intended. An EEA national comes to this country for a short visit. He illegally imports a large quantity of Class A drugs. Having been here for 6 months, he is convicted and a sentence of imprisonment imposed as a result of which he is in custody for 10 years. By reason of his crime, on release he cannot be deported save on imperative grounds of public security. The Secretary of State's only possible means of avoiding this consequence would be to make a decision to deport him when he is sentenced"

In practical terms, it would be difficult for an appellant to show that they had accrued 10 years residence for the purposes of EEA deportation. They may well have lived in the UK for longer than 10 years prior to the decision, but as you have to count backwards from the date of decision, the period of time in prison means that they would not have accrued the relevant period of time for us to show imperative grounds.

If a person acquired permanent residence before going to prison that is not lost by virtue of going to prison. The 'serious' test would still apply.

NB: a number of questions regarding Reg 21(4) have been referred to the European Court in the cases of **Onuekwere (imprisonment – residence) [2012] UKUT 00269(IAC)** and **MG (EU deportation – Article 28(3) – imprisonment) Portugal [2012] UKUT 00268(IAC).** The questions put, centre on how the period of 10 years residence is to be calculated.

Case studies 6-8 (trainers' copy available)

Any questions?

Day 3

Q Any questions from yesterday? Tests trainees on what they've learned.

Asylum

Q - What is a refugee?
Q - Is there a difference between a refugee and an asylum seeker?

An asylum seeker is someone who is seeking refugee status.
A refugee is someone who has attained refugee status.

UNHCR Handbook – procedures and criteria for determining refugee status

Q - The 1951 Refugee Convention was drawn up in 1951 – what led to its inception?

Give out Handbooks – paragraph 5 (1951 convention relating to the status of refugees)

"Soon after the 2nd World War, as the refugee problem had not been solved, the need was felt for a new international instrument to define the legal status….The Convention relating to the status of refugees was adopted by a conference of plenipotentiaries of the UN on 28th July 1951, and entered into force on 21/04/1954. In the following paragraphs it is referred to as "the 1951 Convention".

Definition of a Refugee Para 34:

According to Article 1 A (2) of the 1951 Convention the term "Refugee" shall apply to any person who:
"As a result of events occurring before 1 January 1951 and owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having such a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"

Well founded fear of persecution for a convention reason

So, the definition can be split into 4 parts:

The applicant must have:

A fear
That fear must be well-founded
The fear must be of persecution

The persecution must be as consequence of a convention reason

Fear:

Paragraph 34 puts importance on fear being a defining motive for somebody leaving their country – someone's fear therefore needs to be assessed and considered.

Q – Why does considering an individuals fear create difficulties?

An individual's fear is always going to be **subjective**. Therefore if 2 people experience the same event, they may not both consider it a reason to leave a country.

Factors to consider have to take into account the individual characteristics of the claimant / appellant. For example, if a soldier approaches a 13 year old girl and tells her that he is going to kill her if she doesn't bring him money may see the situation differently than a 30 year old male soldier being confronted by another soldier in the same manner.

38. To the element of fear--a state of mind and a subjective condition--is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

Paragraph 40: "An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no strong convictions…"

To make a fear well founded, there needs to be an assessment of the objective situation as well. Objective evidence may take the form of COIS reports, Amnesty international reports, UNHCR reports and so on:

Paragraph 42: "As regards the objective clement, it is necessary to evaluate the statements made by the applicant….The applicant's statements cannot…be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin – while not a primary objective – is an important element in assessing the applicants credibility…."

Therefore for a fear to be well-founded there needs to be an assessment of both the subjective and the objective fear as well as an assessment of credibility – to be dealt with in detail later.

Persecution

Q – What is persecution?

There is no absolute definition of persecution. The handbook at paragraph 51-53 offers the closest definition for our purposes:

Para 51: "There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From article 33 of the 1951 convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.

Other serious violations of human rights – for the same reasons – would also constitute persecution"

So, a threat to life is always persecution and serious violations of human rights would amount to persecution

Q – Why is there no definition of persecution?

Para 52 "whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraph. The subjective character of fear of persecution requires an evaluation of the opinions and feelings f the person concerned. It is also in light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary"

Q – The definition uses the word persecution – so if someone states they have been discriminated against, could they qualify as a refugee?

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

Discrimination exists in every society, and while unpleasant, in most circumstances it won't amount to persecution.

Convention Reason

Q – Looking again at the definition, can the fear be of anything? I.e. spiders , heights?

No, the fear not only has to be well founded and of persecution, it has to be for a convention reason.

Ask trainees for examples of each of the convention reasons:

Race / Ethnicity (paragraph 68-70):
Kurdish in Turkey, Jewish in Nazi Germany

Religion (paragraph 71-73):
Christians in Iran, Jehovah's Witnesses in Eritrea

Nationality (paragraph 74-76):
Eritreans in Ethiopia, Palestinians in Lebanon

Political Opinion (including imputed) (paragraph 80-86):
MDC in Zimbabwe

Particular Social Group (paragraph 77-79):
Divorced women in Pakistan, Lone women in Somalia

Q - What is a particular social group (PSG)?

Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v. [1999] UKHL 20; [1999] 2 AC 629; [1999] 2 All ER 545 (25th March, 1999)

Shah & Islam was a case about divorced women from Pakistan who were perceived as having committed adultery. It sets out a two step test for identifying whether or not an appellant fits into a PSG:

- Does the group contain an immutable characteristic? (something that cannot be changed)
- Does the group exist independently of the persecution?

Whether or not an appellant is part of a PSG needs to be determined by the background evidence. For example, the court in Shah and Islam found that Pakistani women *are* a social group. They decided this because the background evidence showed that discrimination against women is endemic in every section of Pakistani society. They found that Shah and Islam would be ostracised if returned to Pakistan. The judgment does not however mean that women in every country in the world are a PSG. For example, Ethiopian women are not a PSG; nor are Congolese women.

Internal Relocation

Even if a person meets the definition as outlined at paragraph 34 that does not mean they will be granted refugee status. There are other factors which must be considered.

If you were a Christian living in a predominantly Muslim area in a small village where you were having problems with your neighbours; but you were told that 20 miles away there was a village that was majority Christian as well, what would you do?

Internal relocation is important when considering whether or not somebody should be recognised as a refugee – could they reasonably be expected to move elsewhere?

The issue of internal relocation has been considered in the courts, with the same approach being confirmed throughout:

Would it be unduly harsh to expect a person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?"

The test that needs to be considered is not whether it is unduly harsh in comparison to the UK, rather in comparison to the area of former habitual residence of the appellant.

The words *unduly harsh* are most closely associated with the case of Robinson. **Robinson, R (on the application of) v Secretary Of State For Home Department & Anor [1997] EWCA Civ 2089 (11th July, 1997)**

The CoA in the case of Robinson sanctioned the legal test of *unduly harsh*.

In actual fact the CoA didn't conceive of the test themselves. They actually adopted a principle outlined in a Federal Court of Canada judgement called Thirunavukkarasu.
At para 19 they give examples of situations which might be considered unduly harsh:

Claimants should not have to:

- cross battle lines to reach a safe area.
- live in an isolated region of their country, like a cave in the mountains, a desert or jungle.

Agents of persecution:

Q – Does it make a difference who is persecuting the appellant (i.e. neighbour or soldier)?

Para 65 "persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. ….Where serious discriminatory or other offensive acts are committed by the local populace they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection"

The importance of the above paragraph is that state agents – police, army, government officials etc are recognised as being potentially agents of persecution, but so are non state agents as well – a different political party, a neighbour etc but only if the persecution or discrimination is knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

This leads to:

Sufficiency of Protection:

It was the House of Lords in **Horvath v. Secretary of State For The Home Department [2000] UKHL 37 (6th July, 2000)** who established the legal test for sufficiency of protection.

"I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals… in order to satisfy the fear test in a non-state agent case, the applicant for refugee status must show that the persecution which he fears consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection" (p126 - final paragraph)

No citizen can expect the state to offer 24 hour protection. The test is whether the state are willing and able to provide protection. Horvath expresses the view that we live in an imperfect world, and an expectation would not be placed on the surrogate state (i.e. the UK) to provide constant 24 hour protection, and therefore no expectation can be placed on the country of return.

The COIS reports will outline the protection which the police and authorities in the appellants home country can provide.

If the background evidence shows that the authorities in the appellant's home country are willing and able to protect him he is not entitled to refugee status.

Prosecution not Persecution

If a person's fear is simply that he has committed a criminal act and faces prosecution, this will not bring him within the scope of the convention. Every country is entitled to prosecute a person suspected of committing a crime.

The only instance in which a case of this nature would come within the terms of the convention is when the prosecution (arrest, trial, punishment) would be harsher *for* a convention reason

Deserters / Draft Evaders

Lord Bingham in **[2003] UKHL 15, Sepet** considered 5 documents in an attempt to establish whether or not there was provision in law that allowed a person to benefit from one of the 5 convention reasons on the grounds of conscientious objection.

He concluded that he could find nothing in the law allowing for a ***right*** to conscientious objection.

The document which gave the HoL the clearest guidance was the Refugee handbook. Take trainees through paras 167-174 of the UNHCR Handbook.

Sepet's appeal failed because of para 171 of the UNHCR Handbook. Sepet failed to establish that he would be forced to take part in military action which is condemned by the international community as contrary to the basic rules of human conduct.

The only instance in which a case of this nature would come within the terms of the convention is when a person can show that the punishment which will be meted out to him as a result of evading the draft or objecting on grounds of conscious would be harsher *for* a convention reason e.g. Jehovah's Witnesses who evade the draft in Eritrea.

Famine / Flood / Civil War

Para 39 "…The expression "owing to well-founded fear of being persecuted"--for the reasons stated--by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated…"

164. "Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention…"

(**NB: to trainer** - However, today such persons ***may*** be covered under para 339c of the Immigration Rules (see **Elgafaji [2009] EUECJ C-465-07** and **[2009] EWCA Civ 620 QD (Iraq) & AH (Iraq) v SSHD)).** More on this later…

Economic Migrants

When looking through the appellant's documents ascertain whether the appellant's motive for fleeing their home country was a desire for economic betterment:

Para 62: "A migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee"

Future Risk

Q – You are dealing with an Iraqi case, and the appellant has claimed that he feared Saddam Hussein – his claim has been believed and it is clear that he was persecuted in the past by Saddam. Can he still qualify as a refugee?

No. A person must show a risk of persecution if returned today.

Senathirajah Ravichandran v. Secretary of State for the Home Department

Staughton LJ's closing remarks 3 paragraphs from the bottom of his judgment.

"There remains the question as to what point of time should be the focus of a decision by a special adjudicator or the Immigration Appeal Tribunal. Section 8(1) of the Asylum and Immigration Appeals Act 1993 provides:

"A person who is refused leave to enter the United Kingdom under the 1971 Act may appeal against the refusal to a special adjudicator on the ground that his removal in consequence of the refusal would be contrary to the United Kingdom's obligations under the Convention."

That manifestly looks to the future at the date of the appeal. It reflects article 33 of the 1951 Convention… - take trainees to the handbook and show them what it says.

Refugee Sur Place

Para 94 "The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of a well-founded fear…a person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee sur place

Para 95 "A person becomes a refugee sur place due to circumstances arising in his country of origin during his absence…

Para 96 "A person may become a refugee sur place as a result of his own actions, such as associating with refugees already recognised, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances"

For example, Iranians who convert to Christianity after arriving in the UK or Zimbabweans who join the MDC after arriving in the UK. There will be those who are unable to express their true feelings in their country of origin particularly if there is a tyrannical regime in place. This should not be held against them.

The fact that a person's activities may be entirely disingenuous does not mean that they are not a refugee. What matters is how their activities will be viewed by those in their country of return.

Internal Relocation Exercise:

Ask trainees to consider convention reason; SOP, prosecution vs persecution etc as well.

Cessation Clauses

Q – If someone has been recognised as a refugee, do you think there is a situation where they stop being a refugee?

Paragraphs 111-139 UNHCR Handbook

113 "Article 1c of the 1951 convention provides that:
This convention shall cease to apply to any person falling under the terms of section A if:

(1) he has voluntarily re-availed himself of the protection of the country of his nationality; or
(2) Having lost his nationality, he has voluntarily re-acquired it; or
(3) He has acquired a new nationality and enjoys the protection of the country of his new nationality; or
(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
(5) He can no longer, because of the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality
(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence

The remaining parts of the section offer explanations of each of the 6 clauses. Essentially a person can cease to be a refugee – offer examples of each e.g. (1) – he has gone and acquired a passport or returned to the country lawfully etc.

Historically Refugees were granted ILR these days they are granted an initial period of 5 years leave. At that point we can decide whether or not to renew.

Article 1 F

This provision allows the Secretary of State to exclude certain individuals from the protection of the refugee convention. The provision is most closely associated with persons who have committed war crimes; however it also applies to persons who have committed other serious crimes. It is not necessary for us to show that a person has actually been convicted of a particular crime in order to invoke the provision we simply have to show that 'there are serious reasons for considering that' a person has committed a particular act.

Article 1 F of the 1951 Convention:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

Refer trainees to the definitions of each subsection on the handout.

If you believe a person falls within Article 1 F you must consult your SCW who provide you with advice on the topic.

Burden and Standard of Proof

The burden is on the SoS to prove that an appellant falls within the exclusion criteria. Given the serious consequences of exclusion for the person concerned the article must be interpreted restrictively and used cautiously. The standard of proof is: 'there are serious reasons for considering that' the appellant has committed an act contrary to Article 1F. It is a standard above mere suspicion and well below the criminal standard of proof. We would also argue that it is below the civil balance of probabilities, as has been confirmed in other jurisdictions. This was confirmed by the Supreme Court in the case of **JS (Sri Lanka), R (on the application of) v Secretary of State for the Home Department (Rev 1) [2010] UKSC 15.**

Mere membership of organisations which commit war crimes is not enough to justify exclusion under Article 1F - this was confirmed in **JS (Sri Lanka), R (on the application of) v Secretary of State for the Home Department (Rev 1) [2010] UKSC 15.**

The court in JS considered:

"What more is required beyond mere membership of an organisation which commits war crimes for a person to be excluded form the protection of the Refugee Convention?"

Lord Brown answered that question at para 38:

"Put simply, I would hold an accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organisation's ability to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose." This is a definition (loosely) based on the concept of joint criminal enterprise that is set out reasonably well in Article 25(3)d of the Rome Statute.

Article 33 / Section 72 of the 2002 Act

Article 33

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

The difference between article 1F and article 33/s72 of the 2002 Act

Article 1F excludes a person from the protection of the Convention and therefore excludes them from the rights set out in that Convention. A person to whom Article 1F applies is not a refugee, even if they meet the definition in Article 1A(2).

Article 33(2) is different. When it applies, it does not exclude a person from being a refugee if they meet the definition in Article 1A(2). Rather, it takes away the key protection afforded to refugees by the principle of *non-refoulement*.

This principle is stated in Article 33(1). *Non-refoulement* is the prohibition of the enforced removal of a refugee to a country where that individual's life or freedom would be threatened. Under Article 33(2) enforced removal is permitted **only** if the refugee either presents a danger to the security of the United Kingdom, or has been convicted of a particularly serious crime and is a danger to the community. The most common reasons why the SoS may have to use article 33 are for example:

The person concerned has already been granted refugee status, and the SoS intends to deport them following a criminal conviction in the UK.

Article 33(2) has been placed in domestic law by virtue of s72 of the NIAA 2002 (trainees to refer to the Act).

S72 places a presumption in law that a subject poses a danger to the community of the UK if certain criteria apply.

- What we consider for the application of S72, is not the maximum sentence that could have been imposed – nor the time a person actually spends in prison or detention, rather we consider the period of imprisonment to which they were actually sentenced.
- Subsection (4) of S72 enabl**ed** the Secretary of State to specify by an order, offences in respect of which, regardless of the length of sentence imposed, there is a presumption that the offender is a danger to the community, however the current 'serious crimes order' has very recently been found to be unlawful in the case of **EN (Serbia) and KC (South Africa)**, as a consequence we can't rely on it. Therefore certificates should not be issued under s72(4).

Qualification Directive

So far we have been working from the Refugee Handbook. Up until 2006 this was the only document which we used to determine whether a person was entitled to refugee status. This changed following the inception of the Qualification Directive (official title: Council Directive of 29 April 2004 (2004/83/EC (Refugee Status)).

The Qualification Directive was drafted because different EU countries were applying different criteria to determine whether a person was entitled to refugee status. For example, before the Qualification Directive some countries (e.g. Germany) didn't recognise non-state agents as being agents of persecution – now they have to.

The purpose of the directive was to ensure that every EU state applies the same criteria.

Each EU state was required to put the directive into their domestic law. The UK did this in 2 ways:

1. Via the Immigration Rules
2. Via the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI No. 3145) – a statutory instrument

So, many of the things we have discussed now feature in the Immigration Rules and the qualification regulations e.g. definition of a refugee; definition of a PSG etc.

In the Immigration Rules you can find the following:

334 – grant of asylum
339A -Cessation clauses
339C – humanitarian protection
339HA – 339ND – consideration of application
339O – internal relocation
339P – sur place claims

In the Qualification Regulations you can find the following:

Regulation 3 – actors of persecution or serious harm
Regulation 4 – actors of protection
Regulation 5 – acts of persecution
Regulation 6 – reasons for persecution
Regulation 7 – exclusion (i.e. Article 1 F)

The Qualification Directive didn't affect the UK a great deal. The most significant change for us was the insertion in the Immigration Rules of an additional form of protection – Humanitarian Protection (known in the Directive as Subsidiary protection). The provision was introduced to provide protection for those who are at risk of serious harm if returned to their home country but do not have a convention reason. It is not possible to be a refugee and qualify for HP, it is one or the other (339C (ii)).

Paragraph 339C sets out the criteria.

339C

A person will be granted HP in the UK if the SoS is satisfied that:

(i) He is in the UK or has arrived at a port of entry in the UK
(ii) He does not qualify as a refugee as defined in regulation 2 of the Refugee or Person In Need of International Protection (Qualification) Regulations 2006;
(iii) Substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
(iv) He is not excluded from a grant of humanitarian protection

Serious harm consists of:

(i) The death penalty or execution
(ii) Unlawful killing
(iii) Torture or inhuman or degrading treatment or punishment of a person in the country of return or;

(iv) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Serious harm is the key term. It is often referred to as 'Article 15(c) as this is where it appears in the Directive. Part (iv) of the definition of serious harm has been the subject of a large amount of debate in the courts.

The court in **Elgafaji (Justice and Home Affairs) [2009] EUECJ C-465/07** determined the test that a person must meet to satisfy para (iv). At para 45 the court said this:

> "Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:
>
> the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
>
> the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat."

The term 'internal armed conflict wqas defined by the court in the case of **QD (Iraq) v Secretary of State for the Home Department [2009] EWCA Civ 620** as:

""Situations of international or internal armed conflict" in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji."* [para 35]

Divide trainees into groups (depending on size) allow 30/45 minutes for them to go through the exercise – using only the COIS report and the scenarios – they are to imagine that it is 1939 and they do not have any knowledge of events thereafter.

Credibility

So far we have looked at the law. However, when considering whether a person is a Refugee the very first thing we have to decide is whether we believe them. If we or a judge do not believe the statements made by a person then there is no need to consider whether they have a convention reason or whether they can internally relocate etc (although in practice decision-makers will cover all issues and present them as 'arguments in the alternative').

It is essential to find out whether or not an appellant is telling the truth. What are we looking for to establish whether an appellant is credible?

Discrepancies: For example, is the appellant discrepant in their own account. At one point they have claimed to have been detained for 6 months, yet another for 2 months.

Inconsistencies: For example, the appellant's account of being at a demonstration on 2nd May is inconsistent with the objective evidence stating the demonstration took place on the 2nd November.

Plausibility: The account doesn't make sense – could it have happened? This can be useful when considering the appellants account leading up to an escape. Anything can happen, the question is, did it happen to the appellant?

Personal credibility: For example any evidence which shows the appellant to be of bad character. For example, is there any disclosable evidence that the applicant has a criminal record? Or any evidence of bad behavior while detained? Anything which shows that the person is not a witness of truth.

A key part of personal credibility is s8 of the Asylum and Immigration (Treatment of Claimant's Act etc.) 2004 (take them to the legislation).

8 (1) "In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority **shall take account, as damaging the claimant's credibility**, of any behaviour to which this section applies"

Points to cover:

The section is couched in mandatory terms – a judge must find that credibility is damaged if a person has given evidence of behaviour falling within s8.

The examples of behaviour given in s8 are not an exhaustive list.

A deciding authority is defined in s 8(7) – so if an appellant fails to answer a question at the appeal hearing that would be behaviour falling within s8.

Section 8 is a consideration that goes towards overall credibility. It is important to be aware that it is not and cannot be a starting point. For example, if the appellant has produced a forged document it doesn't necessarily mean that they are lying about being persecuted in the country they are fleeing.

SM (Section 8: Judge's process) Iran [2005] UKAIT 00116

"Even where **section 8** applies, an Immigration **Judge** should look at the evidence as a whole and decide which parts are more important and which less. **Section 8** does not require the behaviour to which it applies to be treated as the starting-point of the assessment of credibility".

Section 8 Scenarios – work through the exercise as a group with the trainees – they are to identify what part of section 8 applies.

Core of the claim

When challenging a person's credibility it is important that you challenge the core of their claim. By the core of the claim we mean the crux of events, or the reason that somebody has left the country. The reason for this is because of the judgment in **Chiver (Asylum; Discrimination; Employment; Persecution) (Romania) [1994] UKIAT 10758**. The Tribunal found that a claim may contain some inconsistencies: it is expected that asylum seekers will exaggerate. The important factor is whether or not the **core of the claim** remained intact. Periphery elements, even if there are credibility issues in these, may not have an ultimate effect on whether someone is a refugee.

Weak and strong credibility points

If you wish to challenge a person's credibility it's important that the credibility points you highlight are strong. By way of example, the fact that a person may have claimed at interview that they escaped from detention at 1pm, yet in their statement claimed they'd escaped at 1.3pm is not a sufficient basis to challenge a person's credibility, and in fact is likely to show the Secretary of State in a poor light.

Burden / Standard of proof

He who asserts must prove. The claimant is asserting that they meet the definition of a refugee therefore the burden lies with them to prove it. We don't have to prove that a person is not a refugee they have to prove that they are a refugee.

Probably the most fundamental legal judgment in the field of Refugee law is the judgment that established what the standard of proof in asylum cases is.

Sivakumuran, R (on the application of) v Secretary of State for the Home Department [1987] UKHL 1 (16 December 1987)

The House of Lords held:

That an applicant's fear of persecution should be well-founded means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for "a convention reason" if returned to his own country.

Q Why is there such a low standard?

A Applicants are required to prove their case outside of the country in which the events which caused them to flee occurred. Meaning that many will not have ready access to evidence (documents/witnesses) which can help prove their case. Most will have fled their country of origin in a hurry and therefore won't have had the opportunity to bring evidence with them. In some cases it may not even be safe for them to leave with evidence on their person.

Q So, what does this mean for you in practice?

A An applicant is not expected to provide documentary evidence to prove their case, so you cannot ask for a negative interference to be drawn if documentary evidence has not been provided.

It's also important to note that although the standard is low it is still a standard that must be achieved.

ASYLUM EXERCISE – Eritrean (The statement is on the main handout. There is a separate handout of background evidence. There is also a trainers' version.)

Day 4

Q Any questions from yesterday? Test trainees on what they've learned.

NB: to trainer - day 4 is a very full day, that may spill over into day 5. In order to fit it all in we recommend the following timings: 0930-1045 to reach Razgar ; 1100-1300 from Razgar up to private life 276ADE ; 1400-1630 from 276ADE to the end. This is achievable, provided the trainers stick to the material and remain focused.

What is the Human Rights Act 1998?

- An act of Parliament of the UK which came into force on **02/10/2000**
- It put the 1950 European Convention on Human Rights into UK domestic law
- Makes available in UK courts a remedy for a breach of a convention right without the need to go to the European Court of Human Rights in Strasbourg
- Abolished the death penalty in UK law
- The Act makes it unlawful for any public body to act in a way that is incompatible with the Convention, unless by the wording of an Act of parliament, there is no other choice – it applies to all public bodies within the UK.
- It also requires that UK Judges take account of decisions of the Strasbourg court, and to interpret legislation in a way that is compatible with the convention.

Q – If a decision was made on 01/09/2000 do we consider the appellants human rights?

It will be unusual for you to see such an early decision, but if you are presented with one, there will be no human rights to consider, it will be asylum only.

Types of Human Rights Articles:

Distribute Human Rights Schedule (outlining all articles)

Absolute Right

No derogation is possible. If it is found that removal a person will result in a breach of an absolute right that person will be granted leave to remain under the Human Rights Act. There are no circumstances in which we can exclude them from the protection of the Human Rights convention (refer back to Article 1 F). Article 3 (no one shall be subject to inhuman or degrading treatment or punishment) is a good example of an absolute right.

Limited Right

Some derogation is permitted. There are limits to the application of the right – i.e. if prescribed in law. Article 5 (right to liberty and security) is a good example.

Qualified Right

The rights of the state are balanced against the rights of the individual. Article 8 (right to private and family life) is a good example.

Article 2 – Right to Life

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

Q: Absolute, Limited or Qualified right?

Article 2 is often assumed to be an absolute right, however it is in fact a limited right. This is because there are circumstances in which derogation from the right is permitted.

Bahaddar vs Netherlands – for a breach of Article 2 there **has to be a near certainty of loss of life.**

This is an incredibly high test and rarely would an appellant be able to show this near certainty

If Article 2 is being raised, then this would usually be done alongside Article 3.

Article 3 – Prohibition of Torture

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"

This is one of the most common articles that are raised at appeal. It is an ABSOLUTE RIGHT. There can be no derogations or watering down regardless of the appellant's conduct.

(Distribute EctHR Jurisprudence Article 3 Bundle)

3 parts of the definition to look at – Torture, inhuman treatment / punishment & degrading treatment / punishment

Torture

Q – What is torture?

Trainees to read **Ireland v. United Kingdom - 5310/71 [1978] ECHR 1 (18 January 1978)** and follow with discussion.

- There needs to be a minimum level of severity for article 3 to be breached.
- The assessment of that is relative – depends on age, sex, circumstances etc
- The findings were clear on whether torture had taken place – it was found that it had not:
- The UK however was found to be in breach of article 3 since, although not torture, it was found that the techniques constituted inhuman and degrading treatment

Some selected paragraphs from the full judgment on the handout:

"…ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc." (Para 162)

"The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3 (art. 3). The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance." (Para 167)

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3 (art. 3), between this notion and that of inhuman or degrading treatment.

In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted. (Para 167)

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 (art. 3) of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. (Para 167)

Soering v United Kingdom - 14038/88 [1989] ECHR 14 (7 July 1989)

Trainees to read Soering and follow with discussion.

- When making a decision to remove someone, we must consider whether removal will result in a breach of their Article 3 rights. Previously to this it was considered that the UK

was only responsibility for securing rights "within our jurisdiction" (see Article 1 of the Human Rights Act – on the handout).

- There has to be **substantial grounds and a real risk** of a future breach – this is higher than a simple possibility
- The facts of the case were considered in line with Ireland v UK and part of the reason why there would be a violation of article 3 were due to his age and mental state at the time of the offence
- Returning him to Germany to face trial there would not be a breach.

At Para 88 of the full judgment they refer to the preamble of the 1951 Convention. The Court stated (on the handout): "It would hardly be compatible with…the preamble…were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture."

Note the words 'substantial grounds for believing' The Court in Soering took those words directly from another Convention. The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The Court sum up their position at Para 91 "In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that state under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.

The Court found that extradition of Mr. Soering would result in a breach of his Article 3 rights on the grounds that the 'death-row phenomenon' amounts to 'inhuman and degrading treatment'. In order to make that finding the Court applied the test and factors to be considered as espoused in **Ireland v. the UK** (Para 100 Soering).

Q So, we now know where the standard of proof in human rights cases comes from, but does the test 'substantial grounds for believing that there is a real risk' differ from 'reasonable degree of likelihood'?

A No.

The IAT (as was then) in **STARRED Kacaj (Article 3, Standard of Proof, Non-State Actors) Albania [2001] UKIAT 00018 (19 July 2001)** addressed this point at para 10 of their judgment (on the handout).

Degrading Treatment or Punishment

Trainees to read **Tyrer v United Kingdom - 5856/72 [1978] ECHR 2 (25 April 1978)** and follow with discussion.

There must be an **intention to humiliate** – it was considered possible that the Manx population actually supported the continuation of birching because it was considered to be degrading and thus an effective deterrent for that reason.

As with the refugee convention, it is possible that Article 3 can be breached by an individual as well as the state.

Article 3 case law, as with ALL human rights case law is always changing. The ECHR is referred to as a "living instrument" and it is important to keep up to date. Whenever you are preparing a case with Human Rights, check RU site, Human Rights Law, Article 3 for the most up to date cases.

Removal of those in poor health

Trainees to read **D. v. THE UNITED KINGDOM - 30240/96 [1997] ECHR 25 (2 May 1997)** and follow with a discussion.

D established that Article 3 could be used to resist removal on medical grounds.

D provides a test which is used as the basis of more recent case law and although it was found that there would have been a breach in D's case, there were a number of specific considerations and circumstances that led to that conclusion.

It is important to note that it is an incredibly high test, and very unusual for anyone to be successful.

Factors that led to D being successful:

D arrived in the UK on a visit visa in possession of £120,000 worth of cocaine. He was arrested and sentenced to 6 years' of imprisonment. He was diagnosed with AIDS while in prison. By the date of the ECHR hearing his illness was at an advanced stage (CD4 count of less than 10). With continued treatment in the UK his life expectancy was only in the region of only 8-12 months. Removal to St. Kitts would have hastened his death further. He had only one remaining relative left in St. Kitts, a cousin, and no evidence had been adduced to show that the cousin would be willing or in a position to care the terminally ill D. There was no health care providing for drugs treatment of AIDS in St. Kitts, although there were 2 hospitals which cared for AIDS patients by treating them for opportunistic infections. There were sanitation problems in St. Kitts and concerns over whether D could obtain shelter or a bed in one of the hospitals. D had also developed a close bond with his carers in the UK.

The ECHR in deciding whether Article 3 was relevant to the case stated at Para 49 (on the handout) "It is true that this principle [Article 3] has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those non-state bodies in that country when the authorities there are unable to afford him appropriate protection…Given the fundamental importance of Article 3…the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise…To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection."

This issue was examined again by the ECHR in **N V The United Kingdom - 26565/05 [2008] ECHR 27 May 2008**

N was seriously ill when she arrived in 1998 (although claims that she was unaware that she had AIDS). Her CD4 count was 10 (a healthy CD4 is 500) and she had additional secondary complications.

She received medical treatment in the UK and her CD4 count rose to 414 and it was said that the medication she had been prescribed had boosted her immune system to a level where life could be continued for some years, without those drugs she would face a swift regression and probably death within 1-2 years. Obtaining the same medication in Uganda would be problematic.

- D was the starting point of legal consideration
- The application of Article 3 protection is limited by the EctHR to "very exceptional circumstances"
- Aliens have no right under Art 3 to claim medical services that are not readily available in their home country
- A comparison of health benefits and assistance in the expelling / receiving state do not give rise to such entitlement
- The present medical condition in D was the only rationale that made the case truly exceptional

There must be truly exceptional circumstances in the appellants "present medical condition". Therefore in cases where the appellant was previously very ill but has since stabilised, the circumstances found in D do not exist. It is not legally relevant that the condition may re-occur on removal within 1-2 years or that the same treatment will be harder to obtain in the home country

In all cases before the AIT, the IJ would have to compare the appellant to D and not N, merely being in a worse position than N would not mean that they were as exceptional as D

Q In deciding whether removal will result in a breach of a person's Article 3 on the grounds of ill health what will you need to address

A

- ***At what stage in the illness are they?/Advancement of the disease?***
- ***Has the UK accepted responsibility for the Appellant's care?***
- ***What treatment are they currently receiving?***
- ***What treatment if any is available for the Appellant's medical condition in their country of origin?***
- ***What support do they have in the UK compared with support available in their home country?***

Articles 4, 5, 6 & 7

We will be briefly going through these Articles – no case law bundles as it is rare for them to be raised by an appellant (they may be cited on the grounds of appeal, but not relied on at the hearing).

EX PARTE ULLAH [2004]UKHL26

It is clear from the cases of Soering and D that an applicant can rely on Article 3 when resisting removal/deportation/extradition. That is despite the fact that that Article 1 of the

Convention states that parties are required to secure the rights of individuals "within their jurisdiction".

The HoL in Ullah considered whether an applicant could rely on one of the other articles to resist removal/deportation/extradition.

The HoL examined Strasbourg jurisprudence – everything from D to Soaring; Saadi to Bankovic and a range of other cases. They concluded that the Strasbourg Court is quite clear that reliance *can* be placed on one of the other articles to resist removal although at the time no one had ever successfully argued that removal should be prevented on the basis of one of the other articles (we now have the case of EM (Lebanon) – foreign breach of Article 8 found to be a flagrant denial of the appellant's article 8 rights).

At Para 24 Lord Bingham states (on the handout):

"While Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case.

Lord Bingham goes on to endorse the test espoused by Mr. Ockelton in Devaseelan (a test which has since been endorsed again by the HoL in EM Lebanon).

He states:

"The correct approach in cases involving qualified rights such as those under articles 8 and 9 is in my opinion that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in *Devaseelan v Secretary of State for the Home Department* [2002] IAT 702, [2003] Imm AR 1, paragraph 111:

"The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case - where the right will be completely denied or nullified in the destination country - that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state".

NB: to trainer: Lord Steyn (at the end of the judgment) gives very good examples of circumstances in which an applicant could successfully rely on one of the other articles (Paras 41-46)

Q So, what does this mean for you in practice?

The burden is on the appellant to show that removal will result in a flagrant denial of one of the articles.

Success under one of the other articles will be rare. In most cases after assessing the appellant's evidence it will be sufficient to simply state that the appellant has not shown that removal will result in a flagrant denial of one of the other articles.

Second Appeals

The inception of the Human Rights Act 1998 (2nd October 2000) created the phenomenon of 'second appeals'. Appellants who'd lost their appeals under the Refugee Convention prior to 2nd October 2000, and had still not been removed, lodged a claim under the Human

Rights Act. On refusal, those applicants appealed. Adjudicators (as they were then known) found themselves in a situation in which they were required to determine the risk on return to an appellant under the Human Rights Act by assessing evidence/facts which had often remained largely unchanged since the first Adjudicator's determination, albeit they were applying a different Convention (same standard of proof though, and largely the same test). The question the Court in the case of **STARRED Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702 (13 March 2002) (AKA Devaseelan)** considered was to what extent the second Adjudicator should have regard to the first Adjudicator's findings. For example, if an Appellant was found not credible by the first Adjudicator is the second Adjudicator now allowed to find the Appellant credible?

The Court set-down the following guidelines (Paras 39-42):

1. **The first Adjudicator's determination should always be the starting-point.**

2. **Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator**

3. **Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator.**

4. **Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection.**

5. **Evidence of other facts - for example country evidence may not suffer from the same concerns as to credibility, but should be treated with caution.**

6. **If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator…the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and *make his findings in line with that determination***

7. **The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is *some very good reason* why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him.**

Although it is now unlikely that you will come across a situation in which an applicant has been refused under the Refugee Convention prior to 2nd October 2000, and is now making a claim under the Human Rights Act the case is still relevant. That is because the Devaseelan principle has since been developed further.

[2003] UKIAT 00053 B (Pakistan)

The Tribunal found "the principles set out in **Devaseelan** apply to all categories of appeals coming before adjudicators and the Tribunal". (paragraph 15)

TK (Georgia) [2004] UKIAT 00149

The Tribunal concluded that the Adjudicator was entitled, on the facts of this case, to treat the husband's determination as authoritative.

Q So in practice what does this mean for you?

Any evidence submitted by the Appellant which was not before the first judge must be challenged in cross-examination:

- Why was the evidence not before the first judge?
- Why has the evidence only come to light now?
- Where did the Appellant get the evidence from? (this normally exposes the lie)
- Is the new evidence reliable?

In submissions after relying on the reasons for refusal notice your first sentence should be: Following Devaseelan the starting point for your determination is the determination of the first Judge...

Comment on the reliability of any new evidence.

You will also need to comment on the up-to-date country situation.

To note: the Devaseelan principle does not apply to those previous determinations which have been 'set aside'. Those found to be flawed following a successful appeal.

Article 8 – Right to respect for family and private life

(Distribute EctHR Jurisprudence Article 8 Bundle)

1. Everyone has the right to respect for his private and family life, his home and his correspondence
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

Article 8.1 therefore sets out the protected rights.
Article 8.2 sets out the permissible interferences with that right.

Article 8 is divided therefore into 2 parts:

1) Private Life (which includes work; study; sexuality; health; religion etc.)
2) Family Life

Private Life

Trainees to read **Niemietz v Germany - 13710/88 [1992] ECHR 80 (16 December 1992)** and follow with discussion

- Beyond the "inner circle"
- Right to establish and develop relationships with others
- Includes activities of a business or professional nature

Family Life

Q - What relationships are included in "family life"?

Trainees to read **X, Y AND Z v. THE UNITED KINGDOM - 21830/93 [1997] ECHR 20 (22 April 1997)** and follow with discussion

- Not confined solely to families based on marriage and MAY encompass other de facto relationships
- Number of factors relevant
- Where family tie with a child exists the state must act in a manner calculated to enable that tie to be developed

Note that there is a 2 stage consideration – 8.1 and 8.2. It was found that although there was family life (i.e. article 8.1 was engaged) there was no violation of article 8. That is because **Article 8 is a QUALIFIED right** – balancing act between the rights of the individual (8.1) and the interests of the state (8.2).

The case of **Bensaid v United Kingdom - 44599/98 [2001] ECHR 82 (6 February 2001)** is also useful, for what it says about private life.

At paras 46-47 the Court stated (on the handout):

"Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity

"Private life" is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8…Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world… The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

Put simply, if removal results in the deterioration in someone's mental state, through for example the withdrawal of medication counselling etc. then that could affect their ability to form and maintain relationships; hold down a job etc. This would adversely affect their family/private family life; therefore potentially resulting in a breach of their Article 8 rights. This is known as a foreign breach.

Bensaid did not succeed. The Court found that his argument was based on speculation.

Types of breach of Article 8

There are 2 types of breach:

Domestic

Where removal would interfere with the claimant's private and family life which they have formed in the UK.

The standard of proof in such cases is ‘on a balance of probabilities’. These cases are considered under the immigration rules.

Foreign

Where removal would interfere with the claimant’s private and family life in the country to which he will be removed.

A foreign breach is most likely to be based on private life specifically on the basis of health, but not necessarily. The threshold in order to establish a foreign breach is a high one. The appellant must show that removal will result in a ‘flagrant denial’ (**Ullah, R (on the Application of) v Special Adjudicator [2004] UKHL 26**) of their right to enjoy a private and family life in the country to which they will be removed.

That phrase ‘flagrant denial’ has been defined most recently in the case of **EM Lebanon [2008]UKHL 64** (on the handout).

"In our view, what the word 'flagrant' is intended to convey is a breach…so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article." [Para 3]

The appellant in EM succeeded in persuading the House of Lords that removal would result in a flagrant denial of her family life in Lebanon.

Her son had reached the age of seven when, under the system that regulates the custody of a child of that age under Shari'a law in Lebanon, his physical custody would have passed to his father or another male member of his family. Any attempt by her to retain custody of him there would have been bound to fail. This is simply because the law dictates that a mother has no right to the custody of her child after that age. She may or may not have been allowed ‘visitation’ (That would give her access to her son during supervised visits to a place where she could see him). But under no circumstances would his custody have remained with her. The close relationship that exists between mother and child up to the age of custodial transfer cannot survive under that system of law where, as in this case, the parents of the child were no longer living together when the child reached that age. The HoL found that there would be a real risk that the very essence of the family life that the appellant and her son have shared together up to that date would be destroyed or nullified. [Para 5]

The HoI also took into account the interests of her son. His mother had cared from him since his birth. He had a settled and happy relationship with her in this country. Life with his mother was the only family life he knew. Life with his father or any other member of his family in Lebanon, with whom he has never had any contact, would be totally alien to him. [Para 18]

Q So, what does this mean for you in practice?

A Should you have to deal with a foreign breach claim you must assess the appellant’s circumstances in light of the cases of EM (Lebanon) and Bensaid.

Q So, how do we decide whether a person has established a family and or private life in the UK, and whether removal will result in a breach of Article 8?

A

***For a long time the SoS adopted the approach as espoused by the House of Lords in* R (On the application of RAZGAR) v SECRETARY OF STATE FOR THE HOME DEPARTMENT (2004) House of Lords. The approach was thus:**

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

However, there was a difficulty with this approach; and it concerned step 5 – proportionality. Parliament never gave a view on how a decision-maker should determine when it was proportionate to remove a migrant. That vacuum meant that we in effect allowed the courts to determine that for us. Over time, the courts developed a very generous interpretation of what was proportionate; resulting in migrants being granted leave in some instances where they'd broken our laws and had spent very little time in the UK. On 9th July 2012 Parliament sought to plug that vacuum. Now, a migrant's claim to remain on the basis of family and private life is determined by set criteria detailed in the immigration rules (with the exception of foreign breaches which are determined in the usual manner).

Appendices FM and FM-SE

Family life claims are dealt with under appendices FM and FM-SE. This is so whether the claimant is outside the UK or inside the UK. Appendix FM replaces much but not all of part 8 of HC395.

Paragraph A277 of the Immigration Rules (at the beginning of Part 8) states:

A277 From 9 July 2012 Appendix FM will apply to all applications to which Part 8 of these rules applied on or before 8 July 2012 except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280.

So, many family members are now considered under Appendix FM of HC 395. Those categories which still fall to be considered under the 'old' part 8 are detailed in paragraph A280.

The routes

There are 2 routes to settlement available to family members:

5-year route:

This route is for those who meet all of the requirements of the rule.

10-year route:

This route is for those who do not meet all of the requirements of the rule but to whom the exceptions apply.

The rationale for the 2 routes is that it encourages applicants to abide by the rules. If they abide by the rules they will obtain settlement sooner.

Under both routes applicants are granted leave in blocks of 30 months (2.5 years).

Partners

Partner is defined in **GEN.1.2.**

Give trainees a few minutes to read the entry clearance partner rule then taken them through the points below.

Looking at selected parts of the entry clearance rule:

Entry Clearance

EC-P.1.1. The requirements to be met for entry clearance as a partner are that-
(a) the applicant must be outside the UK;
(b) the applicant must have made a valid application for entry clearance as a partner;
(c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability–entry clearance; and
(d) the applicant must meet all of the requirements of Section E-ECP: Eligibility for entry clearance as a partner.

<u>Suitability</u>

The suitability requirements feature in section S-EC: Suitability – entry clearance. Paragraphs 1.2 - 1.7 are mandatory. Paragraph 2.2 – 2.4 are discretionary. Persons applying for entry clearance to enter the UK on the basis of their family life under Appendix FM are not subject to the General Grounds for Refusal, except for those provisions in paragraph 320 subparagraphs (3), (10) and (11) which continue to apply to family applications under Appendix FM for entry clearance, leave to enter or leave to remain. This is explained in rule A320 (at the beginning of Part 9 of HC395).

A320. Paragraphs 320 (except subparagraph (3), (10) and (11)) and 322 do not apply to an application for entry clearance, leave to enter or leave to remain as a Family Member under Appendix FM.

Make sure you refer to the correct suitability criteria. The entry clearance suitability criteria can be found in section S-EC: Suitability – entry clearance of HC 395 and the LTR suitability criteria can be found in section S-LTR: Suitability - leave to remain of HC 395. When dealing with non-partner applications (e.g. adult dependent relatives, which we will look at later) you still refer to the suitability criteria contained in the partner section. The suitability criteria aren't replicated in the other sections.

Eligibility – Relationship Requirements

Type of leave

E.ECP.2.1 shows the type of leave a sponsor must have.

Prohibited degree of relationship:

This is defined in paragraph 6 of HC395:

"prohibited degree of relationship" *has the same meaning as in the Marriage Act 1949, the Marriage (Prohibited Degrees of Relationship) Act 1986 and the Civil Partnership Act 2004.*

In England and Wales, the Marriage Act 1949 prohibits a marriage by a man and any of the persons mentioned in the first column, or between a woman and any of the persons mentioned in the second column, of the following table:

Mother	Father
Daughter	Son
Father's mother	Father's father
Mother's mother	Mother's father
Son's daughter	Son's son
Daughter's daughter	Daughter's son
Sister	Brother
Father's sister	Father's brother
Mother's sister	Mother's brother
Brother's daughter	Brother's son
Sister's daughter	Sister's son

The Marriage (Prohibited Degrees of Relationship) Act 1986 prohibits a marriage to the following, until both parties are aged 21 or over, and provided that the younger party has not at any time before attaining the age of 18 been a child of the family in relation to the other party:

Daughter of former wife	Son of former husband
Former wife of father	Former husband of mother
Former wife of father's father	Former husband of father's mother
Former wife of mother's father	Former husband of mother's mother
Daughter of son of former wife	Son of son of former husband
Daughter of daughter of former wife	Son of daughter of former husband

The Marriage (Prohibited Degrees of Relationship) Act 1986 also prohibits a marriage to the following:

Mother of former wife, until the death of both the former wife and the father of the former wife	Father of former husband, until after the death of both the former husband and the mother of the former husband
Former wife of son, until after the death of both his son and the mother of his son	Former husband of daughter, until after the death of both her daughter and the father of her daughter

The couple has met

This was an existing requirement under Part 8 of the immigration rules, it has simply been maintained by Appendix FM.

Meherban [1989] Imm AR 57

"Whilst there is no requirement that a couple have met in the context of marriage they should at least have an appreciation of each other's appearance and personality. It is not enough simply to have seen each other once."

Rewal Raj [1985] IMMAR 151

"Implies a face to face meeting… a meeting when the parties are very young does not meet the requirement of the rule."

Genuine and subsisting

Factors which may be associated with a genuine and subsisting relationship (taken from the published IDI on this topic, available on the UKBA website, Chapter 8 Appendix FM (family members) Annex FM 2.1) are on the handout. Give trainees a few minutes to read the guidance. Highlight a few of the factors.

Definition of valid marriage

Marriage in the United Kingdom

All marriages which take place in the United Kingdom must, **in order to be recognised as valid**, be monogamous and must be carried out in accordance with the requirements of the Marriage Act 1949, as amended by the Marriage Acts of 1970, 1983 and 1994, the Marriage Regulations of 1986 and other related Acts (e.g. the Children Act 1989) (paragraph 6 of HC395).

Appendix FM-SE of HC395 specifies:

Evidence of Marriage or Civil Partnerships

22. A claim to have been married in the United Kingdom must be evidenced by a marriage certificate.

23. A claim to be divorced in the United Kingdom must be evidenced by a decree absolute from a civil court.

24. A civil partnership in the United Kingdom must be evidenced by a civil partnership certificate.

25. The dissolution of a civil partnership in the UK must be evidenced by a final order of civil partnership dissolution from a civil court.

26. Marriages, civil partnerships or evidence of divorce or dissolution from outside the UK must be evidenced by a reasonable equivalent to the evidence detailed in paragraphs 22 to 25, valid under the law in force in the relevant country.

Marriage overseas

The recognition of any marriage which has taken place overseas is governed by the following:

- is the type of marriage one recognised in the country in which it took place?
- was the actual marriage properly executed so as to satisfy the requirements of the law of the country in which it took place? (This relates to the requirements for the marriage ceremony itself).
- was there anything in the law of **either** party's country of **domicile** (at the time of the marriage) that restricted his/her freedom to enter the marriage?

If the answers to the above questions are respectively, "yes", "yes" and "no" then the marriage is valid whether or not it is polygamous.

If you do not know whether a marriage transacted overseas is legally recognised in that particular country please contact the relevant post overseas for guidance.

Proxy marriages

The issue in cases involving proxy or telephone marriages is whether that form of marriage is valid according to the law of the country in which it was contracted.

Telephone marriages

The formal validity of a telephone marriage is to be determined according to the laws of the countries in which **both** parties are physically present when the marriage takes place. Therefore, a telephone marriage celebrated whilst one of the parties is in the **United Kingdom** will **not** be valid as telephone marriages are not valid in this country.

In cases where the UK-based sponsor was overseas when a telephone marriage took place and the laws of both countries recognise such marriages, we cannot deny that the marriage is valid. Enquiries about the marriage laws of other countries may be referred to Policy.

Intention to live permanently with the other

HC395 paragraph 6:

"**intention to live permanently with the other**" and intend to live together permanently means an intention to live together, evidenced by a clear commitment from both parties that they will live together permanently in the United Kingdom immediately following the outcome of the application in question or as soon as circumstances permit thereafter.

Financial requirements

The Government asked the independent Migration Advisory Committee (MAC) to advise on a minimum financial threshold a British Citizen or settled person would require before their partner could enter or remain in the UK.

Migrants must now show that they have the following:

£18,600 gross annual income [£22,400 if they have a child + £2,400 per additional child – **excludes Brit Cit, EEA children with a right to remain in the UK under the EEA Regs and children with ILR**).] alone of in combination with specified savings of £16,000 (as a minimum) and additional savings of an amount equivalent to 2.5 times the amount which is the difference between the gross annual income and the total amount required under para E-ECP.3.1 or para E-ECP.3.2 being met.

£18,600 is the level at which a couple generally cannot access benefits

An applicant can rely on several sources to meet the financial requirement but not promises of third party support (a gift of cash is fine but loans are not allowed)

Financial requirement ensures the migrant partner:

1. Does not become a burden on the taxpayer
2. Is well enough supported to assist their integration

In order to enter the UK the Applicant must demonstrate that they fulfill the Financial Requirement. This can be demonstrated by (see FM-SE):

Employment (sponsor only in EC applications – see para 1(c) of FM-SE)
Savings
Other non employment income (e.g. rent; investments, pension etc.)
Combination of the above.
Self-employment (sponsor only in EC applications). Note that savings cannot be combined with self employment (See 13(f) of FM-SE).

The Applicant will be exempt from the Financial Threshold if their Partner is in receipt of (see E-ECP.3.3):

- Disability Living Allowance (DLA)
- Severe Disablement Allowance (SDA)
- Industrial Injuries Disablement Allowance
- Attendance Allowance
- Carer's Allowance

However, they must still provide evidence that their partner is able to maintain and accommodate them without recourse to public funds.

Appendix FM-SE:

All applications must be accompanied by certain 'specific evidence'. This is set out in the Immigration Rules at Appendix FM-SE, which was added to the immigration rules as a result of the findings in the case of **Alvi ((2012 UKSC 32),** where the Supreme Court found that a refusal based on requirements contained in guidance and not in the Immigration Rules was not lawful.

Highlight some key parts of FM-SE. As a suggestion:

- Para 1(a) – the format bank statements must take.
- Para 1(b) – the limits on third party support.
- Para 1(c) – income must be lawful. Original documents required.
- Para 2 – evidence of employment required.
- Para 5 – evidence required in respect of maternity pay
- Para 6 – evidence required in respect of sick pay
- Para 7 – evidence required in respect of self-employed
- Para 10 – evidence require din respect of non-employment income.
- Para 11 – evidence required in respect of case savings.
- Para 13 – how gross annual income is to be calculated.
- Para 21 – sources of income which will not be counted.

Accommodation

"Overcrowded" means overcrowded within the meaning of the Housing Act 1985, the Housing (Scotland) Act 1987 or the Housing (Northern Ireland) Order 1988.

If we assert in our decision that the accommodation breaches the public health regulations this will be as a result of information obtained from a home visit or from another agency. Policy believe it will be rare for us to raise this issue in our decisions.

English language requirements

Paragraphs 27-32 of Appendix FM-SE detail the evidence required for the English Language requirements.

The Applicant will be exempt if:

- They are 65 or over
- They have a disability which prevents them from reaching the requirement
- There are exceptional circumstances that prevent them from being able to meet the requirement.

Exercises:

Q The applicant and partner have no income. What cash savings must they have?

A They have a shortfall of £18,600. £18,600 x 2.5 = £46500. £46500 + £16000 = **£62500**

Q The applicant and partner have an income of £18,000. What cash savings must they have?

A They have a shortfall of £600. £600 x 2.5 = £1500. £1500 + £16000 = **£17500**

Q The applicant and partner have an income of £15423. What cash savings must they have?

A They have a shortfall of £3177. £3177 x 2.5 = £7942.5. £7942.5 + £16000 = **£23942.5**

Q The applicant and partner have an income of £15000. What cash savings must they have?

A They have a shortfall of £3600. £3600 x 2.5 = £9000. £9000 + £16000 = **£25000**

Leave to remain

The leave to remain requirements can be broadly divided into 2 types of cases:

1. Partners who meet all of the Eligibility requirements (i.e. status; finance and English), and therefore aren't relying on EX.1. So, they must meet parts (a); (b) and (c).
2. Partners who **don't** meet all of the eligibility requirements, and *are* relying on EX.1 (in the main you will deal with this type of case in your asylum; HP and removal appeals). So, they must meet parts (a); (b) and (d).

We will deal with the second type of case later.

Section R-LTRP: Requirements for limited leave to remain as a partner

R-LTRP.1.1. The requirements to be met for limited leave to remain as a partner are-

(a) the applicant and their partner must be in the UK;

(b) the applicant must have made a valid application for limited leave to remain as a partner; and either

(c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant must meet all of the requirements of Section E-LTRP:

Eligibility for leave to remain as a partner; and

(iii) paragraph EX.1. has not been applied; or

(d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and E-LTRP.2.1.; and

(iii) paragraph EX.1. applies.

Suitability

Same as before, with the addition of requirements relating to criminality.

Eligibility – Relationship Requirement

First part the same save for fiancées.

What would we consider a good reason for the marriage not having taken place?
These cases are very rare. One good example is ill health eg a wedding was arranged and the partner was in a car accident so it had to be rearranged for a few months later, but is still going ahead.

Eligibility - Immigration status requirements

The applicant must have last entered the UK with leave that was longer than 6-months (with the exception of leave as a fiancée which *is* permitted) ie cannot be a visitor or on temporary admission.

Note – we disregard periods of overstaying of 28 days or less.

Financial requirements

The same. Although additional employment/self employment income from the applicant and permitted benefits paid to the applicant where applicable *can* be taken into account (this is not permitted in EC applications.)

English language requirements

The same.

Children

- The new rules for children contained in **Appendix FM of HC 395** are for those children seeking LTE/R as a child whose **parent** has made an application for entry clearance or leave, or who has limited leave as a partner. They replace **paras 301, 303A and 303D-303.**

Section EC-C: Entry clearance as a child
EC-C.1.1. The requirements to be met for entry clearance as a child are that-
(a) the applicant must be outside the UK;
(b) the applicant must have made a valid application for entry clearance as a child;
(c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability for entry clearance; and
(d) the applicant must meet all of the requirements of Section E-ECC: Eligibility for entry clearance as a child.

Suitability

The same as Entry Clearance

Relationship Requirements – key points

The appellant must not be leaving an independent family life. This is defined in paragraph 6 of HC395.

"must not be leading an independent life" *means that the applicant does not have a partner as defined in Appendix FM; is living with their parents (except where they are at*

boarding school as part of their full-time education); is not employed full-time or for a significant number of hours per week (unless aged 18 years or over); is wholly or mainly dependent upon their parents for financial support (unless aged 18 years or over); and is wholly or mainly dependent upon their parents for emotional support

Financial Requirements

The same

English

No requirement

Leave to remain

Section R-LTR-C: Requirements for leave to remain as a child contains similar provisions to the previous section.

Family life as a parent of a child in the UK

Entry Clearance

Section EC-PT: Entry clearance as a parent of a child in the UK
EC-PT.1.1. The requirements to be met for entry clearance as a parent are that-
(a) the applicant must be outside the UK;
(b) the applicant must have made a valid application for entry clearance as a parent;
(c) the applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability–entry clearance; and
(d) the applicant must meet all of the requirements of Section E-ECPT: Eligibility for entry clearance as a parent.

Suitability

The same as entry clearance.

Eligibility - Relationship Requirements – key points

E-ECPT.2.3. Either -
(a) the applicant must have sole parental responsibility for the child; or
(b) the parent or carer with whom the child normally lives must be-
(i) a British Citizen in the UK or settled in the UK;
(ii) not the partner of the applicant; and
(iii) the applicant must not be eligible to apply for entry clearance as a partner under this Appendix. (**NB: to trainer** – this is to prevent applicants from trying to avoid the income threshold by applying as a parent.)

Are we still using the definition of Sole responsibility given by the court in **TD (Paragraph 297(i)(e): "sole responsibility") Yemen [2006] UKAIT 00049 (24 May 2006)**? Policy have still not confirmed this.

Access rights to the child

What evidence should they provide to prove this?

Applicant must provide evidence that they are taking and intend to continue taking an active role in the child's life?

Eligibility - Financial Requirements – key points

As you can see, there is no financial 'threshold' under this route, the existing maintenance requirement remains. The reason for this is because this route is quite different to the spouse route. The parent does not have a UK based sponsor so it's difficult to make the 'threshold' policy work. In addition, generally it is in the best interests of children to have this route so it's also a question of proportionality.

Paragraph 6 of HC 395 (under **'in breach of immigration laws'** in bold) states that 'adequate' and 'adequately' in relation to a maintenance and accommodation requirement shall mean that, after housing costs have been deducted, there must be available to the family the level of gross income that would be available to them if the family was in receipt of income support.

Third party support is not permissible – see appendix FM-SE 1(b)

Prospective employment is also not permissible – see appendix FM-SE 1 (c)

Assessing the adequacy of the funds available

In calculating whether the applicant can be adequately maintained, you should follow the following steps:

(a) Establish the sponsor's and/or applicant's (if they are in the UK with permission to work) current income. The gross income should be established and if the income varies, an average should be calculated. Income from disability benefits can be included as income.

(b) Establish the sponsor's current housing costs from the evidence provided.

(c) Deduct the housing costs from the gross income.

(d) Calculate how much the sponsor and his family would receive if they were on Income Support

(e) Compare the sponsor's gross income after deduction of housing costs with the equivalent Income Support rate.

Eligibility - English Language Requirement

The same

Leave to remain

Section R-LTRPT: Requirements for limited leave to remain as a parent

Again, the LTR provisions can broadly be divided into 2 types of case:

1. Parents who meet all of the Eligibility requirements (i.e. status; finance and English), and therefore aren't relying on EX.1. So, they must meet parts (a); (b) and (c).
2. Parents who **don't** meet all of the eligibility requirements, and *are* relying on EX.1 (in the main you will deal with this type of case in your asylum; HP and removal appeals). So, they must meet parts (a); (b) and (d).

We will deal with the second type of case later.

Eligibility - Immigration status requirements

Again, the applicant must have last entered the UK with leave that was longer than 6-months.

Note – we disregard periods of overstaying of 28 days or less.

Eligibility – Financial Requirements

The existing maintenance requirements.

Eligibility – English language requirement

The same.

ILR – settlement

Section R-ILRPT: Requirements for indefinite leave to remain (settlement) as a Parent

Dependent relatives

Adult dependent relative (ADR) applications are now dealt with under Appendix FM. Prior to 9th July 20120, ADR applications were dealt with under paragraph 317 (which fell under 'Part 8: Family members' of the immigration rules). HC194 (paragraph 91) inserts:
A277:
From 9 July 2012 Appendix FM will apply to all applications to which Part 8 of these rules applied on or before 8 July 2012 except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280.

Entry clearance

The ADR section of Appendix FM begins on page 42 (and ends on page 44). This route is only available to an applicant outside the UK: a person cannot switch into this route in the UK.

The section begins with Section EC-DR, setting out the requirements to be met for entry clearance as an adult dependent relative:

a) *The applicant must be outside the UK;*
b) *The applicant must have made a valid application for entry clearance as an adult dependent relative;*
c) *The applicant must not fall for refusal under any of the grounds in Section S-EC: Suitability for entry clearance; and*

d) *The applicant must meet all of the requirements of Section E-ECDR: Eligibility for entry clearance as an adult dependent relative.*

Suitability

The suitability requirements to be met are the same as those applied elsewhere for entry clearance in Appendix FM. .

Eligibility

The eligibility requirements for entry clearance as an ADR are found in Section E-ECDR. There are two parts: relationship requirements and financial requirements.

Grant of leave

Section D-ECDR explains the leave that will be granted if somebody can show they meet the requirements for entry clearance as an ADR. If they are dependent on a person settled in the UK then they will be granted indefinite leave to enter. If their sponsor only has limited leave in the UK, then the ADR will be granted leave in line with this i.e. it will expire at the same time (if the sponsor then applies for further leave, the ADR can do likewise).

Key points to cover

The below terms are covered on the handout:

"Require long-term personal care as a result of age, illness or disability"

"Unable to receive the required level of care in the country where they are living"

Whether there is anyone in the country where the appellant is living who can reasonably provide the required level of care

"Adequately maintained, accommodated and cared for"

Indefinite leave to remain (ILR)

An applicant who is in the UK as an ADR and whose sponsor is present and settled in the UK (or is in the UK with refugee leave/HP and has made an application for ILR) may qualify for ILR as an ADR.

This is dealt with in section R-ILRDR.

Suitability

Again, the suitability requirements to be met are the same as those applied elsewhere for leave to remain in Appendix FM.

Eligibility

The eligibility requirements are found in section E-ILRDR.

Adult dependent relative

Seymour is 87 and has just become a widower. He is living alone in Zimbabwe and his 3 children are all grown up and living in the UK. He wishes to stay with his daughter Abigail and her young family. There is a spare room for Seymour, although he will have to share a bathroom and kitchen with the rest of the family. Abigail's husband is a Doctor and he earns enough to feed an extra mouth.

Consider Seymour's case under section EC-DR of appendix FM. Also consider the evidential requirements detailed in paragraphs 33-37 of appendix FM-SE.

1. **Would you grant or refuse Seymour under the relevant rule?**
2. **Why?**
3. **Would you want more information? If so what?**
4. **Are there any questions you want to ask?**

Section EC-DR applies. Under this section the applicant must applicant must not fall for refusal under any of the suitability grounds in S-EC and must meet the eligibility requirements.

Suitability requirements – section S-EC
There is no evidence that Seymour falls for refusal under this section.

Eligibility:
Relationship requirements
Seymour must provide documentary evidence that he meets E-ECDR.2.1 (para 33 appendix FM-SE)
There is no evidence to demonstrate Seymour meets E-ECDR.2.4. or E-ECDR.2.5 (para 34-35 appendix FM-SE).

Financial requirements

The evidence required under the 'financial requirements' E-ECDR.3.1. – E-ECDR.3.2 has not been provided.

EXCEPTIONS EX.1 (Article 8)

The exceptions apply in circumstances in which appellants do not meet all of the eligibility requirements of the family member rules. In **all** types of family member applications and appeals all parts of Appendix FM should be addressed (i.e. suitability; eligibility and EX.1); although in asylum; HP and removal appeals appellants do not have to meet all of the eligibility criteria. More on this in a moment…

Paragraph 109 of HC 194 inserts paragraph 326B to the Immigration Rules:

"326B. Where the Secretary of State is considering a claim for asylum or humanitarian protection under this Part, she will consider any Article 8 elements of that claim in line with

the provisions of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these Rules."

Paragraph 114 of HC 194 adds a similar requirement for section 10 (amongst others) removals, by introducing paragraph 400 to the Immigration Rules.

So, we can see straight away that Article 8 issues in asylum; HP and removal cases are to be decided under appendix FM.

In summary:

- Family life will be considered using the criteria in Appendix FM
- Private life will be considered using the criteria contained in rule 276ADE

Section EX: Exception (emphasis added)**:**

EX.1. This paragraph applies if
(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
(aa) is under the age of 18 years;
(bb) is in the UK;
(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;
and
(ii) it would not be reasonable to expect the child to leave the UK;

Or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

This section has 2 parts:

EX.1.(a) concerns relationships between parents and their children.

EX.1.(b) concerns relationships between partners.

The steps to address in parent cases:

1. Consider whether the applicant meets all of the suitability requirements (as set out in S-LTR.1.1 to 3.1).
2. Consider whether they meet the eligibility requirements on relationship (as set out in E-LTRPT.2.2 to 2.4), and immigration status E-LTRPT.3.1.
3. Consider whether EX.1 applies.
4. Applicants can be granted where they meet all of the suitability requirements, the Exception EX.1 and the eligibility requirements on relationship and immigration status (E-LTRPT.3.1. only).

The steps to address in partner cases:

1. Consider whether the applicant meets all of the suitability requirements (as set out in S-LTR.1.1 to 3.1).

2. Consider whether they meet the eligibility requirements on relationship (as set out in E-LTRP.1.2 to 1.12) and immigration status E-LTRP 2.1.
3. Consider whether EX.1 applies.
4. Applicants can be granted where they meet all of the suitability requirements, the relationship and immigration status requirements (E-LTRP.2.1 only) and where EX.1 applies.

The EX.1 'tests'

Policy have defined the phrases detailed in EX.1.

Genuine and subsisting parental relationship

See p 1 and 2 of the extract from the EX.1 IDI.

Would it be unreasonable to expect the child to leave the UK?

See p 2-4 of the extract from the EX.1 IDI.

Genuine and subsisting relationship with a partner

As already discussed.

Insurmountable obstacles

For applicants who assert a right to remain under Article 8 on the basis of relationships falling outside of the scope of EX.1 (e.g. relationships between adults and their siblings/parents), only very rarely will one of these relationships qualify as family life under Article 8. It would require some exceptional circumstances, such as an unusual level of dependence between parties. These cases are not covered in the rules, and so any leave granted would be outside of the rules. Decision makers should consider the criteria in EX.1 to assess whether a grant of leave outside the rules is appropriate.

Variation of leave as a spouse

David came from Jamaica to the UK legally as a visitor, and has spent 5 months staying with his sister. However, he has been engaged to his sister's flat mate for a year, and they married two weeks ago. As they are married, David does not want to separate from his new wife Claire. He has applied to switch his status from a visitor to a spouse. He has moved his things into Claire's room, and she is happy to support him until he can get work in the UK.

Consider David's claim under section R-LTRP of appendix FM. Also consider the evidential requirements detailed in appendix FM-SE.

1. Would you grant or refuse David under the relevant rule?
2. Why?
3. Would you want more information? If so what?
4. Are there any questions you want to ask?

The term 'partner' is defined in Appendix FM at GEN.1.2.

Section R-LTRP applies. Under this section a person must meet either R-LTRP.1.1 (a); (b) and (c) **or** R-LTRP.1.1 (a), (b) and (d). Under this section, the applicant must not fall for refusal under any of the suitability or eligibility requirements.

Suitability requirements - Section S-LTR
There is no evidence that David falls for refusal.

Eligibility:

Immigration status requirements:

David fails under the immigration status requirements at E-LTRP.2.1.

Financial requirements:

There is no evidence to show that he meets the financial requirements from E-LTRP.3.1 onwards.

English Language requirement

Assuming David is a Jamaican *national*, then he satisfies the English language requirement E-LTRP.4.1.(a).

Exceptions:
Since David fails under R-LTRP.1.1.(c) we need to consider R-LTRP.1.1.(d). Therefore, we need to determine if paragraph EX.1 applies:

EX.1.(b) is the relevant rule. David may be able to show that he has a genuine and subsisting relationship with a Brit Cit who is in the UK. However, there is no evidence of any insurmountable obstacles to family life continuing with that partner outside the UK.

David therefore, fails to meet the relevant rule.

CONSIDERING PRIVATE LIFE UNDER RULE 276ADE

Article 8 private life is dealt with under rule 276ADE.

276ADE. The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and

(ii) DELETED.

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment); or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

Key points

Suitability

The applicant must not fall foul of any of the suitability requirements.

Imprisonment

If the applicant has more than 12 months imprisonment the case MUST be referred to CCD.

Continuous residence

'Continuous residence' is defined in paragraph 276A of the Immigration Rules. Continuous residence means residence in the UK for an unbroken period. For the purposes of private life, a period is not considered broken if the applicant:

- was absent from the UK for six months or less at any one time, and
- had existing leave to enter or remain upon their departure and return.

Evidence of length of residence

In order to demonstrate length of residence in the UK, applicants will need to provide credible evidence from an independent source, for example letters from a housing trust, local authority, bank, school or doctor. In order to be satisfied that the UK residence was continuous, the decision maker should normally expect to see evidence to cover every 12 month period of the length of continuous residence, and travel documents to cover the entire period, unless they are satisfied on the basis of a credible explanation provided as to why this has not been submitted.

Assessing whether there are no ties (including social, cultural or family) with the country of origin

In determining whether the person has "no ties (including social, cultural or family)", the decision maker should have regard to the entirety of the applicant's background. If the applicant has a connection under any of the social, cultural and family headings this will be sufficient to demonstrate that ties exist. In making the assessment, relevant factors will include, but are not limited to, the following:

(a) Language – consider whether the applicant speaks an official language of their country of origin, or a language that is commonly understood in parts of that country. For these purposes, fluency is not required – an ability to communicate competently with sympathetic interlocutors will suffice.

(b) Cultural background –consider evidence of the applicant's exposure to and level

of understanding of the cultural norms in the country of origin. Where the person has spent their time in the UK living mainly amongst a diaspora community from their country of origin then it may be reasonable to conclude that they have cultural ties with that country even if they have never lived there, or have been absent from that country for a lengthy period.

(c) Length of time spent in the country of origin – Where the applicant has spent a considerable period living in the country of origin, it will be difficult for them to demonstrate that they have no ties with that country.

(d) Family, friends and social network – An applicant who has extended family in their country of origin should be able to turn to them for support to help them to integrate into society on return. These need not be close blood relatives if the applicant has friends and other contacts to whom they could turn for support. The decision maker should have regard to whether the applicant or their family have hosted visits in the UK by family and friends from their country of origin.

Private life

George, 47, a Gambian national, came to the UK in January 1991 on a student visa valid for 1 year. This was never extended. In November 1991 he was arrested and convicted for shoplifting. He applied in 2012 to remain in the UK on the basis of his long residency. He states that he left the UK in January 1998 to attend his fathers funeral, and returned via France in March 1998. He is married to Naomi and they have 1 child together. To support his family he works as a car park attendant and claims that he has never been a burden on the state.

Consider George's claim under paragraph 276ADE.

1. **Would you grant or refuse George under the relevant rule?**
2. **Why?**
3. **Would you want more information? If so what?**
4. **Are there any questions you want to ask?**

276ADE (i)

We would want to know what his sentence was following his conviction to determine whether he fell foul of 1.3, 1.4 or 1.5. If it was imprisoned for at least 12 months then CCD would need to be informed (CCD should always be informed of a case where the appellant was sentenced to imprisonment for 12 months or more).

276ADE (iii)

To determine whether George has resided in the UK for a continuous period of at least 20 years we need to use the definition of continuous residence found in 276A. Under 276ADE, there is no requirement that this residence be lawful. However, George left the UK in 1998 WITHOUT valid leave on his departure, nor his return. This, therefore, disrupts his length of residence. He has not accrued 20 years continuous residence.

In order to demonstrate length of residence in the UK, applicants need to provide credible evidence from an independent source, for example letters from a housing trust, local

authority, bank, school or doctor. In order to be satisfied that the UK residence was continuous, the decision maker should normally expect to see evidence to cover every 12 month period of the length of continuous residence, and travel documents to cover the entire period, unless they are satisfied on the basis of a credible explanation provided as to why this has not been submitted.

276ADE (iv)-(v)

George is not under 18, or under 25.

276ADE (vi)

If he were to succeed under 276ADE(vi)_he will have to show no ties (including social, cultural or family) to Gambia. He came to the UK at the age of 26, so it is unlikely that he will be able to show *no* ties.

Human Rights scenario Nigerian case.

Deportation

This section applies only to non-EEA nationals. You will remember from day 2 that there are different considerations for EEA nationals.

Q – Do we deport everybody who is unsuccessful with their application?
A – No. Most are merely 'administratively removed' which means that they are not barred from returning. If a person is deported it means they are barred from returning to the UK while the deportation order is in force.

NB: Historically there was a clear distinction between deportation and administrative removal. When a subject was deported they could not come back while the deportation order was in force. Those subjects who were administratively removed *could* return to the UK. However, now that some subjects who are administratively removed are subject to re-entry bans under paragraph 320 of the immigration rules the distinction is not so clear.

The Legislation

The legislation governing deportation has changed frequently over the years. We'll explain what the legislation stated when it was originally drafted and then take you through each change. It is unlikely that you will have to deal with a case which was decided under the original provisions but it *is* possible so it *is* important to know what the legislation originally stated.

Immigration Act 1971 (in force from 1st January 1973)

We'll look first at the provisions of the 1971 Act. Please note that the processes and procedures in 1971 Act deportation cases are very different to those under the 2007 Act – we'll cover those procedures later.

The power to deport comes from s3(5) of the 1971 Act.

S3(5) in it's original form stated:

A person who is not partial shall be liable to deportation from the United Kingdom-

(a) If, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; or
(b) If the Secretary of State deems his deportation to be conducive to the public good; or
(c) If another person to whose family he belongs is or has been ordered to be deported.

Category (a) refers to individuals who have breached the terms of their visa; for example, overstayers; students working longer than they should etc.

Category (b) refers to individuals who have committed serious criminal offences. *Current policy creates a presumption that a person's presence is not conducive to the public interest (for a non-EEA national) if he receives a custodial sentence of 12 months or more either in one sentence, or as an aggregate of 2 or 3 sentences over a period of 5 years*. *In addition to this, as of 1 August 2008, non-EEA nationals who are convicted in the UK and receive a custodial sentence* ***of any length*** *for an offence relating to the supply of class A, B or C drugs will be considered for deportation*

Category (c) refers to the family members of those subjects falling within (a) and (b). Section 5(4) makes it clear that only the spouse/civil partner and minor dependent children will be deported along with the subject. There is no power to deport extended family members and we will not seek to deport spouses/civil partners who are estranged from the subject or a subject's adult children.

The word patrial used in the first sentence of s3(5) means 'right of abode' – s2(6) makes this clear. So, under the 1971 Act as it was originally drafted those with a right of abode could not be deported. S2 outlines those individuals who have a right of abode.

Under the 1971 Act provisions the Secretary of State has discretion as to whether or not to deport an individual. She must decide whether deportation is the right course. She must use paragraph 364 of the immigration rules to help her determine whether a subject should be deported. More on this later…

Immigration and Asylum Act 1999 (in force from 2nd October 2000)

The 1999 Act made a number of changes to the 1971 Act. The word patrial was changed to British Citizen. Therefore subjects who have a right of abode but aren't British Citizens *can* be deported now.

Subjects falling within category (a) (overstayers; students in breach etc.) are no longer deported. They are now merely administratively removed under s10 of the 1999 Act.

Deportation is now reserved only for those who are deemed to be non-conducive to the public good.

Therefore s3(5) of the 1971 Act now looks like this:

A person who is not a British Citizen shall be liable to deportation from the United Kingdom-
(a) If the Secretary of State deems his deportation to be conducive to the public good; or
(b) If another person to whose family he belongs is or has been ordered to be deported.

.

Court Recommended Deportations

S3(6) of the Immigration Act 1971 gives criminal courts the power to recommend deportation when they are sentencing a subject. It is only a recommendation though; the Secretary of Sate does not have to act on it although she usually will.

It will be clear from a Judge's sentencing remarks if a recommendation has been made.

Absence of a court recommendation

An argument may be advanced on behalf of an appellant that because the sentencing Judge did not recommend deportation it was not appropriate for the Secretary of State to decide to deport.

There are a number of counter arguments which we can deploy depending on the circumstances:

1. It may be worth pointing out that the sentencing Judge's attention may not have been drawn to the power to recommend deportation or that the notice required under **section 6(2) of the 1971 Act** might not have been served 7 days prior to sentencing (this is written notice stating that a person is not liable to deportation if he is a British citizen (in which case it is up to the appellant to show that he is a British citizen), and stating the other exemptions from deportation, *which we will be looking at later*).

2. The sentencing Judge may have considered that it was more appropriate for the Secretary of State to decide on deportation.

3. Alternatively, particularly where a long custodial sentence is given, the Judge may have felt that the assessment of whether deportation is appropriate should be taken closer to the time of potential release. Certainly where the sentencing Judge has made no reference to consideration of making a recommendation this should not be taken as an inference that he or she decided that deportation was inappropriate.

4. Even an explicit refusal by the sentencing Judge to make a recommendation does not prevent the Secretary of State deciding to deport. The power to deport lies solely with the Secretary of State.

Paragraph 364 of HC395

Paragraph 364 specifies the criteria the Secretary of State must use to determine whether to instigate deportation action. On 20th July 2006 there was a significant shift in the approach that the Secretary of State must take when considering whether to instigate deportation action. When presenting a case you will need to look carefully at the date of decision. If it was made before 20th July 2006 then you will need to present the case in relation to the old para 364. If, however, the date of decision is on or after 20th July 2006 then the new para 364 needs to be considered (refer delegates to the handout). The new Rule 364 does not apply retrospectively.

Pre-20th July 2006 364

Go through the list of factors covered by the old 364 and how to deal with each of them in cross-exam/submissions (the level of detail required will depend on the experience of the group).

20th July 2006 – 8th July 2012 364

Where a person is liable to deportation, there is now a presumption that the public interest requires that s/he is deported. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in a particular case, but it will only be in exceptional circumstances that the public interest will be outweighed in a case where it would not be contrary to the ECHR/Refugee Convention to deport.

Post 9th July 2012 396 & 397

On 9th July 2012 the rules on deportation were changed again. Rule 364 was deleted and replaced by rules 396 and 397. Although the phrasing and numbering of the rules was altered, the effect remains the same – there is a presumption in favour of deportation and it will only be in exceptional circumstances that the public interest will be outweighed in a case where it would not be contrary to the ECHR/Refugee Convention to deport.

The deportation order

The appellant receives a notice of intent to deport, it is this that they appeal against. There is no appeal against a signed deportation order (except in 'automatic deportation cases whereby the order is served on the subject and then they appeal). Once appeal rights have been exhausted against the notice of intent, and providing that the decision has not been overturned, caseworkers will prepare a submission to Ministers to seek a Deportation Order. An Order is usually signed by the Chief Executive of UKBA, but contentious cases may be referred to the Home Secretary who will sign the order.

Revocation of deportation orders

As mentioned already, a deportation order remains in force indefinitely; it does not expire after a period of time.

Section 5(2) of the 1971 Act provides that a deportation order may at any time be revoked by a further order of the SoS. It is possible for an application to be made under the Immigration Rules for revocation.

For decisions made prior to 30 June 2008, paragraph 391 of the Immigration Rules set out the criteria for applications. Under this rule the following time frames **may** be considered appropriate for revocation:

After 3 years: Overstayers & Workers in breach and their families who have not been convicted of other criminal offences and who were deported under 3(5)(a) of the 1971 Act before it was amended by the 1999 Act
After 10 years: Those convicted of serious offences i.e. violent or sexual crimes, counterfeiting or forgery or drug trafficking.

Note, the above are just guidelines, it should not be read as after 10 years every deportation order should be revoked, rather it should be read as the earliest that revocation will be considered.

For decisions made on or after the 30 June 2008, the amended paragraph 391 applies to applications for revocation (note for trainers, these are the amendments to HC395 made through HC607). These changes mean that revocation is brought in line with the general grounds of refusal and associated bars on return. The prohibition now lasts for 10 years, or until the sentence is spent (whichever is longer). With sentences of over 30 months, which can never be spent, the ban will be permanent (absent Human Rights Considerations).

Applications for revocation can be made either to an ECO or directly to the Home Office.

Summary

- Under the 1971 Act 3 categories of people were deported: overstayers & workers in Breach, non conducives and family members.

- The 1999 act removed overstayers and workers in breach from S3 (5), this category are now administratively removed.

- An absence of a court recommendation does not mean that we cannot pursue deportation.

- Deportation orders do not have an expiry date. The appellant has to apply for revocation.

Standard / Burden of Proof

Standard: Balance of Probabilites

Burden: Us. We have asserted that the appellant has been convicted of a crime, in order to discharge this burden we need to produce a certificate of conviction (which will be in the bundle).

Relevant date

Q – Referring back to day 2 what is the relevant date for deportation appeals?

The relevant date depends on when the decision was made. As with any in-country immigration appeal, if the decision was made prior to the commencement of the 2002 act then the relevant date is the date of decision

If the decision was made after the commencement of the 2002 act then the date of hearing will be the relevant date

Appeal Bundles – what documents to expect in deportation appeals

- Notice of intention to deport
- Appellants response
- Reason for deportation letter (RFDL)
- Certificate of conviction (to discharge the burden of proof)
- Grounds of Appeal

In some circumstances the following may be available:

- Indictment
- Pre-sentence report
- Judges Sentencing remarks

- Parole officers report

(Magistrates courts will not produce the same documents as, for example, Crown courts, i.e. JSRs will not be available).

Automatic Deportation

Although deportation under the United Kingdom Borders Act 2007 is said to be automatic, this refers more to the fact that the Secretary of State is legally obliged to take deportation action (there is no longer discretion under para 364 (see para 364A))

What it marks is a change of emphasis – previously case workers were looking at reasons why the person should be deported. Under the UK Borders Act that decision is already taken: the Case Owner's job is to decide whether or not any of the exceptions from deportation will apply.

The Legislation (brief overview and then a fuller explanation)

32(1) (definition of a foreign criminal and who automatic deportation applies to)

32(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

32(3) Condition 2 is that—
(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
(b) the person is sentenced to a period of imprisonment.

At the time of writing condition 2 is still not in force.

32(4) (deportation of a foreign criminal **is** conducive to the public good – so no discretion)

32(5) (the SoS **must** make a deportation order against a foreign criminal unless an exception applies under s33 – so again no discretion)

33 (outlines the exceptions)

35 (the appeal)

Fuller Explanation:

1. The SoS decides first if a person is a foreign criminal (s32(1)(a) and (b)).

2. Then he decides whether that person falls within either condition 1 or 2 (s32(2) and (3) – as above condition 2 not in force yet)

3. The SoS then sends a letter (ICD 0350) to the foreign criminal explaining that they fall within the provisions of s32 and therefore **may** be subject to automatic deportation. The letter explains that they won't be subject to the automatic deportation provisions if an exception applies. The letter lists the exceptions and makes it clear that they need to inform us if they think one of those exceptions applies. They have 20 working days to do that.

4. If on receipt of the foreign criminal's response it is **clear** that one of the exceptions applies then consideration will be given to using the usual deportation provisions (s3(5) IA 1971) instead.

5. If there are no obvious exceptions then the Case Worker will arrange for the signing and serving of the DO.

Rights of appeal under the automatic deportation provisions

NB: to trainer – rights of appeal are covered on day 5 (tomorrow). Trainer to use their judgment to decide whether rights of appeal in automatic deportation cases should be covered today.

Anything falling within the definition of an immigration decision in s82 of the NIAA 2002 has a right of appeal (although that appeal may be limited in certain circumstances). S35(2) inserts a decision to make an 'automatic deportation order' into s82 of the NIAA 2002. Therefore we know it is an immigration decision, and that it attracts a right of appeal.

Q But is that appeal in-country or out-of-country?

S92 of the NIAA 2002 gives us the answer to that. It is clear from s92(2) that only certain immigration decisions attract an in-country right of appeal. We can see from that section that a decision to make a deportation order (j) attracts an in-country right of appeal. However, s35(2) of the UK Borders Act 2007 makes a clear distinction between decisions to deport falling within s82(2)(j) (i.e. decisions made under the 1971 Act provisions), and those made under the automatic deportation provisions (they come under s82(3A)). S82(3)(A) is not listed in s92(2). Therefore foreign criminals who are subject to the automatic deportation provisions, on the face of it, don't have an in-country right of appeal.

Of course, we also know that s92(4) also gives an in-country right of appeal to those who've made an asylum or human rights claim, and those who claim they are an EEA national.

Therefore those foreign criminals subject to the automatic deportation provisions who have made an asylum or human rights claim prior to the decision to apply s32(5) or who are EEA nationals have an in-country right of appeal.

Q So, how will this work in practice?

If in their response to the ICD 0350 the foreign criminal puts forward an asylum or HR claim (s.113 of the 2002 Act defines what counts as a valid HR/ asylum claim, as per SS & ors Turkey [2006] UKAIT 00074, until s.12 of the 2006 Act comes into force) the Case Worker will assess the foreign criminal's claim.

If the Case Owner believes that the asylum/HR claim is made out then deportation cannot happen.

If the Case Owner believes that the claims are clearly unfounded then the Case Worker will certify under s94 of the NIAA 2002. The Case Owner will draft a decision outlining our reasons why the foreign criminal's asylum/HR claim is clearly unfounded, and why none of the exceptions apply. Automatic deportation will proceed under s32. The

foreign criminal will therefore have an out-of-country right of appeal against our decision as is the norm with certified claims under s94.

If the foreign criminal's asylum/HR claim can't be certified (because it's not clearly unfounded), and because it's an 'arguable' claim (notwithstanding the fact that the Case Owner thinks the claim is not made out) then the Case Owner will draft a decision outlining our reasons why we believe the foreign criminal's asylum/HR claim is not made out and why none of the exceptions apply. The foreign criminal has an in-country right of appeal under s92 of the NIAA 2002.

Q So, at the appeal hearing what will the judge be considering?

- Are they who we say they are?
- Were they sentenced to a period of imprisonment of at least 12 months? If yes, s.35(2) of the UK Borders Act 2007 applies.
- Is there an in-country right of appeal? Only if HR/asylum/ EEA treaty rights breaches have been raised prior to the decision being taken.
- Do any of the exceptions in s.33 of the 2007 Act apply? That will involve consideration of the asylum/ HR claim. N.B. our position will always be that they do not if we have decided to apply s.32(5), there should be consideration of HR/ asylum etc in the decision letter if a claim was raised.
- If the asylum/ HR claim is made out - exceptions apply and deportation under 32(5) is unlawful, appeal allowed on that basis.
- If asylum/HR claim is not made out -and no other exceptions apply - decision to apply s.32(5) must be upheld - appeal dismissed.

Deportation and Article 8

As part of the new immigration rules on Article 8, added to HC395 on 9th July 2012, there is now clear guidance on how to deal with an applicant's claim that their deportation would result in a breach of Article 8. This guidance is contained within the rules themselves and begins at paragraph 398 (to note – on a separate but related matter para 364 was deleted on 9th July 2012. It has been replaced by paras 396 and 397). .

Paragraph 398 sets out three levels of criminality. The most severe of these is at 398(a), where someone is sentence to a period of imprisonment of at least 4 years. In these instances, we would argue that their crime was so serious that the public interest will almost never be outweighed by other Article 8 factors (such as having a family in the UK).

Take delegates through 398 (b) and (c), these set out the remaining two levels of criminality.

If an appellant meets the criteria of 398 (b) or (c) and raises Article 8, then paragraphs 399 and 399A need to be considered.

Paragraph 399 deals with family life. Take delegates through 399.
Paragraph 399A deals with private life. Take delegates through 399A.

If the appellant fails to meet these criteria, then there will be no breach of Article 8 (although, as acknowledged at the end of paragraph 398, there may be *exceptional circumstances* where this is not the case).

These paragraphs also apply to applications for a revocation of a deportation order (see paragraph 390A).

It is important to note that these rules do not apply retrospectively. So, if you are dealing with a decision which was made PRIOR to 9th July 2012, they do not apply. However, you should point out to the Judge that these rules do, for the first time, set out clearly where the public interest lies when considering Article 8 in deportation cases, and they may wish to have regard to these when making their decision.

Day 5

Q Any questions from yesterday? Test trainees on what they learned.

Bail

The only type of bail that Presenting Officers deal with is bail arising from UKBA detention.

When you are dealing with bail cases, you need to be aware that this isn't an appeal. The applicant makes their application to the Judge or a CIO for bail. Therefore, they are not appellants. You should refer to them as applicants at the hearing.

Q – Why do you think UKBA may detain a certain person?

Broadly speaking to effect their removal or deportation.

Q – So who can be detained?

- Those arriving in the UK seeking LTE pending their examination (refer to day 1, immigration control)
- Those refused LTE
- Those who fail to comply with the conditions of their temporary admission
- Those subject to a court recommendation for deportation
- Persons given notice of intention to deport
- Those against whom a deportation order is in force.
- Those who are awaiting the setting or carrying out or removal directions

Although the list suggests broad categories of people that we could detain, we can only detain people if it is in line with our detention policy and because there is always a presumption to liberty.

Detention Policy

In short the policy gives 2 main reasons for detention:

1. Is detention the last resort?
2. Is removal imminent?

Anyone can apply for bail and there is no minimum period that they have to be in the UK or detained for. *Note for trainers, previously port cases had to have been in the country for more than 7 days, this was amended by para 11 of Sch 2 of the 1996 Act*).

Preparation

Trainer to talk through procedure rules 38 and 39.

Points to cover:

- An application for bail is served on the IAC (not UKBA) - 38(1).
- The IAC needs to know whether an appeal by the applicant to the tribunal is pending because this affects whether bail should be granted to appear before the IAC or a CIO, and also because it determines whether removal is imminent i.e. if an appeal is pending it is difficult to argue that removal is imminent meaning that bail is therefore more likely to be granted – 38(2)(c).
- Electronic monitoring is not available in Scotland or Northern Ireland – 38(2)(e).
- The recognizance in England and Wales is a sum of money which an applicant (and or his surety) will agree to pay if the applicant absconds. An applicant does not have to have a recognizance– 38(2)(f).
- A surety is a person who agrees to try and prevent the applicant from absconding should bail be granted. An applicant does not have to have a surety. You must make sure that the sureties who attend the hearing are the same sureties as detail on the application form; if not object to the inclusion of the new sureties on the grounds that the applicant has not complied with the procedure rules – 38(2)(g).
- If an applicant has been refused bail in the past any new application for bail will probably fail unless there has been a change in circumstances since the last application – 38(2)(h).
- When the IAC receive an application for bail they must set a hearing date as soon as possible as a consequence bail hearings tend to be added to court lists at the last moment – 39(1).
- If the SoS wishes to contest the application she must outline her reasons for this. She does this in a 'bail summary'. If a bail summary is not served on the IAC the SoS has technically not contested the application – 39(2).
- Should a judge grant bail he must outline the conditions of bail e.g. where the applicant must sleep; when and where he will report; who will act as surety and the amount of recognizance he and/or his sureties agree to be bound by – 39(4).

Distribute example bail application and summary

Talk through the bail summary highlighting the following areas:

Application details

- Name of the person who is dealing with the case and their contact telephone number.
- Port dealing, in this section it will indicate if it is a FNP case / CCD.
- Date and time that the summary was completed which is important for procedure rule 39 (2) purposes.
- Where the applicant is detained.

Immigration history

- When detained by IS.
- Criteria for detention. Talk through the categories explaining that they all go towards whether detention is the last resort or whether removal is imminent.
- Explain that this section sometimes holds more information than is on the summary so it can assist with preparing for the hearing.

Surety details

Sureties (in Scotland they are known as a cautioner) are people who the applicant lists on their application form. They offer to pay a sum of money if the applicant absconds in order to show how much they trust them and the influence that they have over him or her. The amount of money they offer has to be significant to them i.e. if someone has £10000 in their bank account but only offers £100 this does not show trust in the applicant.

Turn to procedure rule 38. This outlines what details the applicant has to provide regarding their sureties.

Returning to the form:

The details of the sureties are checked by the Home Office, but only via the details that have been provided on the form. If the applicant changes their surety for the hearing, it is unlikely that the Home Office would have been able to check their suitability. You will need to raise this with the Judge.

You should also check the details of the sureties at the hearing. If the applicant spelt their name wrong, or gave an incorrect date of birth on the form, then this invalidates the checks.

If the form shows a result of no trace, then this means there is no record of anything adverse on the system. If there is a trace, but no details have been provided, you will need to contact the person who has written the summary.

Bail Summary

- Check that the immigration history is correct before the hearing.
- Is there evidence provided by the author of the summary to support any assertions made.
- The immigration history should highlight anything significant i.e. when they claimed asylum, when refused, appeal rights exhausted, attempts to gain documentation to remove them
- The reasons for opposing are usually longer and will normally do just that, they highlight all of the reasons why we are opposing the applicant being released on bail.

During prep, you should ensure that you establish:

- When is the person going to be removed?
- Is there any bar to removal such as no travel documents?
- Is there an outstanding appeal?
- Why was the person detained and have they previously had reporting conditions imposed on them?
- Have they complied with conditions previously?

If you have unanswered questions, then you can assume that the Judge will have too. If in doubt contact the author of the bail summary.

The hearing

The IAC's own guidance (Presidential Guidance Note No 1 of 2011: Bail guidance for Immigration Judges, available on the IAC website) contains the following extract:

When is an Immigration Judge likely to grant bail?

In essence, an Immigration Judge will grant bail where there is no sufficiently good reason to detain a person and lesser measures can provide adequate alternative means of control. An Immigration Judge will focus in particular on the following three criteria (which are in no particular order) when deciding whether to grant immigration bail.

a. The reason or reasons why the person has been detained.
b. The length of the detention to date and its likely future duration.
c. The likelihood of the person complying with conditions of bail.

These issues are dealt with below in turn. However, in practice it is often not possible to separate one issue from the others and Immigration Judges will need to look at all the information in the round.

In order to make the decisions required of them, most Judges have developed their own preferences when it comes to bail hearings. Take your lead from the Judge, however, a typical bail hearing will go like this:

- The rep or applicant first makes the application for bail; you rely on the bail summary at this stage.

- You will also have the opportunity to emphasise the most important reasons for opposing bail. You should also take this opportunity to expand on areas if you have new information (i.e. the applicant previously absconded, date of removal)

- The rep will then have the opportunity to argue against the points made in the summary. The Judge can, at this point, decide whether or not he is minded to grant bail in principle.

- If s/he is not then the hearing ends there. Bail is refused.

- If he / she is, then the hearing progresses to bail in practice and sureties will be called (highlight to the trainees that not all Judges follow this procedure, in some cases the Judge will move straight to sureties without considering bail in principle).

- Questioning of the sureties is similar to that in an appeal hearing, the rep will ask questions and you then will have an opportunity to ask questions.

The types of questions you need to ask are ones that show:

- Whether they have the money available to them (3 months bank statements, if large sums of money, evidence of its origin)
- Proof of their identity (passport, remember to check that the details are the same as on the application form)
- Evidence of employment
- Proof of address.
- Where will the applicant live, if not with them how will they exert influence
- The relationship between them, evidence of contact

Although it is not essential to have sureties, if the applicant's sureties do not turn up to the hearing, or if they are considered unsuitable then the applicant always has the option of withdrawing the application. This means that they don't have a refused application on their file; remember that applicants have no limit to how often they apply for bail. They could simply re-apply the following day.

- Following the cross examination of sureties both parties will have a final opportunity to deliver submissions on the suitability of the sureties. Following submissions, the Judge will decide whether bail should be granted in Practice.

It is possible to apply for an adjournment of the bail hearing under the procedure rules. However practicably it is more sensible for an applicant to withdraw and re-apply (length of time to the adjourned hearing vs IAC's listing of new bails). The decision would be down to the applicant.

If bail is granted then the conditions of bail are decided. Return to bail summary. The bail summary will include recommendations that we are making for conditions if the applicant is granted bail. The Judge will take these into account.

The bail summary should indicate where the appellant should live and how often and where the appellant has to report. If these details are not included then call the EO / IO to establish this prior to the hearing. If the reporting centre is missing from the recommendations section, then you should always suggest the closest one to the applicants address.

Bail renewal hearings

If an applicant is granted bail there will be an expiry date to it. If they still have an appeal before the IAC or the Court of Appeal, then there will be a bail renewal hearing before the IAC and this will be combined with their appeal hearing date. If they have no appeals in the system before the IAC or Court of Appeal, then bail will be to a CIO.

Trainer to mention Schedule 2 of the 1971 Act. Bail is only granted under paragraph 29 where the person has an appeal under part 5 of the 2002 Act (S9A of the 1993 Act as inserted by sch3 s3 of the 1996 Act and amended by sch14 s105 & 106 of the 1999 Act includes EWCA hearings).

At the hearing, you will be asked whether you have any submissions to make against bail being renewed. This will depend on whether the applicant has been reporting in accordance with the bail conditions, whether they have absconded and so on.

If bail is opposed then usually we would need a new bail summary outlining the reasons for this.

Bail Scenarios

Work through the scenarios as a group (it should only take approx 10 minutes). Trainees are to identify what questions should be asked to the sureties / applicants.

Bail Forfeiture hearings

If the appellant has failed to meet the conditions of his bail or if he has absconded, the IAC will hold a bail forfeiture hearing where the sureties will be instructed to pay the amount they offered as recognisance. The PO has very little to do with these hearings. If however the Judge asks for your views on how much money the surety should have to pay, you will need to consider the events of the first hearing.

If the surety stated that they understood their responsibilities as a surety, then arguably they should forfeit the entire amount of that money. Especially if they did not inform UKBA immediately that the applicant was not meeting their conditions.

Bail Forfeiture in Scotland

Taken from the IAC's Presidential Guidance Note: Bail Guidance for Immigration Judges

There is a significant difference between bail procedure in Scotland and the rest of the UK is that in Scotland bail money (known as "caution") is normally deposited when bail is granted. This caution is subject to forfeiture if the applicant fails to answer to bail.

Any questions?

Appeals Legislation

Section 82: Right of appeal general

Section 84: grounds of appeal.

Section 83 (in this order): Appeal: asylum claim /humanitarian protection upgrade appeal.

Section 85/85A: relevant date

Section 92: Appeal from within the UK: general

Section 94: (in this order): Appeal from within United Kingdom: unfounded human rights or asylum claim

Trainer to go through this section in a fair bit of detail.

This only applies to appeals brought under s82 NOT s83 or 83A.

This section removes the right to an in country appeal in certain circumstances. The power can only be used in cases where the claim is considered to be 'clearly unfounded'. A claim will be considered clearly-unfounded if either of the following criteria applies:

An applicant resides in a state listed in section 94 (4) *(Designated states)*
An applicant resides outside of one of the designated states but whose claim is considered 'clearly unfounded' under section 94(2). *(This is referred to as case-by-case certification)*

The list of designated states changes. Changes are made to the list by The Asylum (Designated States) Order.

The countries included in section 94(4) have had to meet the two part test laid down in section 94(5) of the Act:

There is in general in that State or part of that State no serious risk of persecution of persons entitled to reside in that State or part of that State, and

Removal to that State or part of that State of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the ECHR.

Case by case certification occurs when for example there is no fear of mistreatment or the treatment feared doesn't amount to persecution.

The Appeal will be heard in the appellant's absence. Usually, this will mean that the case will be based on submissions only (unless the appellant has asked witnesses to give evidence).

"A person may not bring an appeal to which this section applies in reliance on section 92(4) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded".

S96 Earlier right of appeal (NB: to trainer – this section as amended by s30 of the 2004 Act so trainees will have a different version in Phelan).

This section gives the Secretary of State the power to prevent an applicant from appealing against an 'immigration decision' in circumstances in which:

- they could have raised the issue at an earlier appeal (whether or not they actually appealed) and there is no satisfactory reason for why they did not do so or

- they didn't raise the ground in their one-stop notice and there is no satisfactory reason for why they did not do so (this refers to s120 which requires an applicant to inform us of all of the reasons for wishing to enter or remain in the UK in their 'one-stop notice' – **NB**: we don't serve 'one-stop notices' on every applicant)

Q Any questions?

The process prior to an (asylum) appeal:

Explain the process an applicant goes through between claiming asylum, and reaching the appeal stage.

When the applicant claims asylum a screening interview takes place, the application is then forwarded to the appropriate Asylum Team and allocated to a CO. The CO will review the application and, usually, will conduct an interview (this may depend upon age of the applicant etc). After the interview, the applicant may send in further information or representations.

The CO will then make a decision (usually within the first month) as to whether or not the applicant qualifies for asylum or other leave.

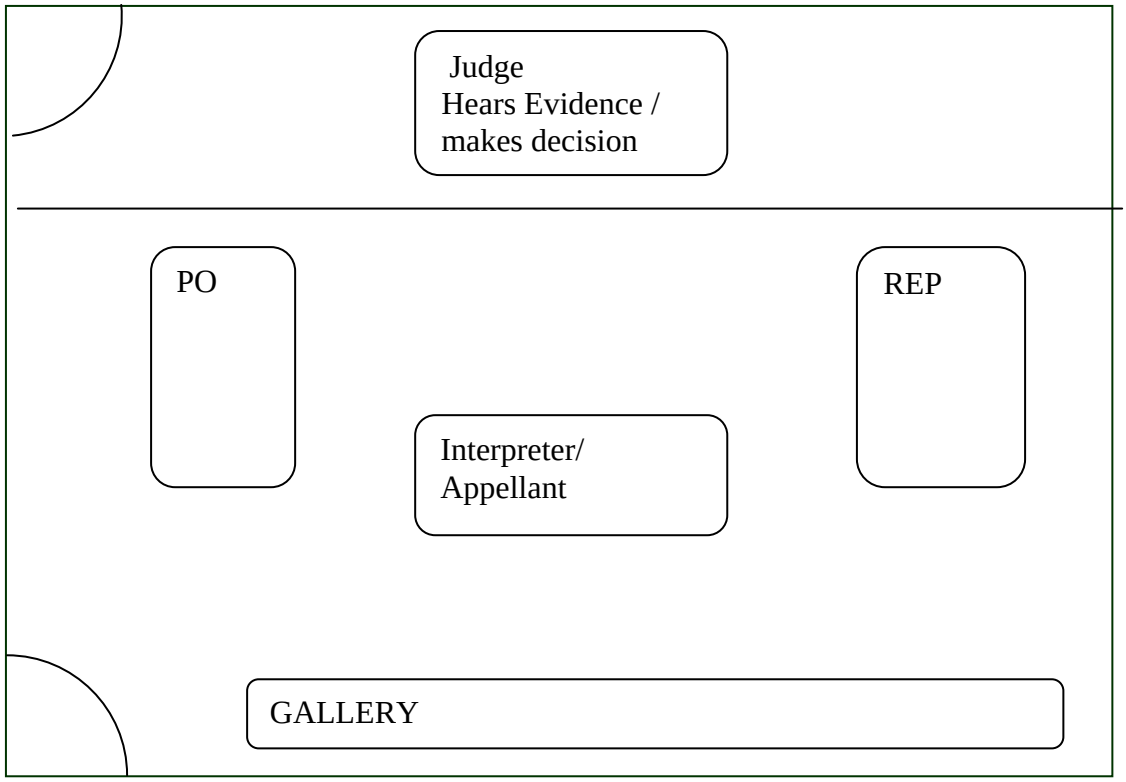
If refused, this decision will normally give rise to a right of appeal - we do not 'give' the right of appeal, we inform the applicant of the right, which is a legislative one).

If the applicant decides to appeal, they must do this within 10 days (this will be different if it is an out of country appeal or fast track appeal).

They have then become the appellant.

Court procedure

Draw this on the board. Go briefly through roles of each participant.



Interpreters – fully qualified and employed by the court service. They interpret what is being said throughout the hearing. They are there to assist the court, and cannot be used by either party e.g. by the representative to speak with his appellant in a private conference before the hearing. And as with all officials at the hearing they must not give evidence. They often provide a simultaneous translation and may well be speaking to the appellant while you are making submissions. Do not let that put you off.

If you do not think that they have interpreted everything said by the appellant, you must raise with the judge immediately (e.g. if the appellant has given a 2 minute answer to the interpreter, yet the answer that is given back to the court is simply 'yes').

The course will cover more detail on each of the parts of procedure later.

Court Etiquette

A lot of court etiquette may sound obvious, but it is the obvious things that people tend not to do. A few simple instructions to start with:

Be on time. Court starts at 10:00am. If you are ever late then apologise to the judge immediately, do not make an excuse.

Dress appropriately - suits. Even in the summer, do not take off your jacket without permission from the judge.

Stand up when the judge enters and leaves the court. Only sit down when the judge instructs you to.

No eating in court. There is water provided on the table, do not take your own drinks in with you.

Turn off / silent mobiles.

Don't walk into the well of the court.

Address the judge appropriately: Sir / Madam, and always remember to stand whenever a judge enters or leaves the room

Address the appellant's representative appropriately. The representative may refer to you as "my friend"; this is a term that legal professionals use. You should refer to the representative as "the appellant's representative" or if you have taken their name refer to them by that (Mr / Mrs / Ms…).

Use plain English at all times. Whilst it is unavoidable that technical issues will have to be addressed, there is no necessity to use some of the language that the judiciary or legal professionals may use. For instance, if you are presenting an immigration case, the decision you are supporting is not your "instructions" – it is a decision made in another business area in line with the law, the Immigration Rules and UK Border Agency policy that you are advancing in support of the strategic aims of the Agency.

If you need a comfort break then ask for one.

The courtroom is a professional environment and you are there to represent the UK Border Agency. Do not argue with anyone. If the representative is interrupting questions or submissions it is the judge who will deal with this.

Be sensitive. These are not criminal proceedings. The appellant (especially if un-represented) may not be clear on the proceedings; they may also not have been in a court or tribunal before.

All conversations to be conducted through the judge. At no point should you and the rep get into a conversation or a dispute across the judge.

At the outset of the hearing, the rep may well approach you to make concessions. Be very aware of what you say and do not make any concessions or withdrawals without, where practical, prior permission from SCW or your TM.

If the rep suggests to the judge that you have accepted certain aspects or that you have made concessions which you have not, raise it with the judge immediately. In doing so, simply state that it appears that the representative may have misunderstood the conversation.

Under no circumstances should you discuss your personal opinions about a decision with any other party.

Q Any questions?

Structure of a hearing at the first tier

Write the different stages on the board and briefly explain each.

- Preliminary issues
- Evidence in chief
- Cross-examination
- Re-examination
- PO submissions
- Rep submissions

Advocacy

Q: What is advocacy?

Prepare fully - know the details of the case and use them in prep, cross and submissions.
Do not give evidence
Do not give your opinion. Never say I think…; I believe…. Instead say, I submit; In my submission; I ask you to find…
Be professional

This section aims to give you an understanding of advocacy and tips on good advocacy practice. There is an advanced advocacy skills module available once you've gained some court experience.

Preparation

Good preparation of a case will invariably lead to a good presentation of that case. Poor preparation usually results in an unfocused series of questions during cross-examination, and a poorly argued case.

Tips:

- Read the minutes first. The minutes will tell you who in the HO has had sight of that file, and what they've done with it. There may also be useful information in the CID notes.
- Then read the PF1 cover sheet. This sets out the appellant's immigration history.
- Then read the Reasons for Refusal Letter, which provides the details of the case and our position.
- Then read the appellant's bundle. This will deal with the appellant's evidence in the PF1 bundle, and will attempt to counter our argument in the RFRL.
- It's always a good idea to read the documents in chronological order. The case will make more sense by doing that, and you won't get confused.
- You should now have identified the main issues in the case (e.g. Is credibility challenged? Is internal relocation an argument? Etc.)
- Identify case law which may assist our case.
- Identify case law which may assist the appellant, and decide how you are going to address it.
- Identify the salient points from the objective evidence which support your case.
- Identify the salient points from the objective evidence which support the appellant's case, and decide how you are going to address those points.
- It's a good idea to type up/write up your notes as you're reading the file. Don't read the file first then start preparing the case. This will take longer.
- Do a chronology of events. This will help you to identify any discrepancies in dates. It will also enable you to see at a glance exactly what happened, where and when, and where in the evidence it can be found.

During preparation it is important that you consider whether the decision is defensible. UKBA is working hard to ensure only sustainable decisions proceed to appeal. If you consider that the decision is unlikely to be upheld by a judge speak to your SCW who will consider whether it is appropriate to withdraw the decision. This does not mean though that a case which is sustainable but perhaps difficult to argue should be withdrawn. The job of the PO is to persuade and influence.

Decisions should usually be withdrawn in situations in which we have failed to follow our own policy or where we've failed to follow statute e.g. a failure to consider the best interests of a child.

All decisions which are **arguable** must proceed to appeal as normal. This includes arguable article 8 decisions.

Authorisation process

All decisions to withdraw must be agreed and authorised by your SCW or Team Manager. Where possible always try and obtain a view from the decision-maker on the merits of withdrawing and preferably gain their agreement. You as the PO together with your SCW or team manager are the ultimate arbiter of whether a decision is winnable though so agreement from the decision-maker to withdraw is not a requirement.

The hearing

Preliminary issues

The first stage of the hearing is preliminary issues. Preliminary issues can be raised by either party and establish whether a case is ready to proceed, although many of the issues that could arise, would normally be dealt with at the CMR hearing.

Q – If preliminary issues establish whether a case is ready to go ahead, what type of issues do you think will be raised?

General document check i.e. do all parties have the same documents; serving of additional documents.
Agreeing how to proceed i.e. is evidence being called?
No convention reason /or clarification of the convention reason
Language to be used
No interpreter available
Adjournments (refer to in detail during procedure rule section of training.
Jurisdiction

Procedure Rules and Practice Statements / Directions:

Both documents regulate the proceedings before the IAC. They exist to ensure that all cases proceed through the system in a similar fashion regardless as to which judge hears the case and regardless as to where in the country the case is heard.

The difference between the 2 is that the Procedure Rules is a statutory instrument (drafted by the MoJ and approved by Parliament) and the Practice Directions/Statements are guidance written by the Senior President or President) for the FT & UT (IAC.) They provide further clarification to the procedure rules and are intended to be read alongside them.

Both documents regulate not only the appeal hearing but events pre and post hearing as well. You must take these documents to court with you. You are most likely to use them during 'preliminary issues'.

Procedure Rule 4 explains the aim of the Procedure Rules

4. The overriding objective of these rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and where appropriate, that members of the tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest.

Draw the comparison between the overriding objective of the procedure rules and the aim of the PO/CO i.e. ensuring that appeals go through the system efficiently.

Practice Direction 7 – Case Management review hearings and directions.

This section sets out what both parties should have prepared for the hearing itself. It also confirms at 7.2 that the CMR hearing is considered to be a hearing of the appeal, and failure by either party to attend may lead the judge to proceed to consider the substantive appeal.

Procedure rule 13 – filing of documents by respondent:

This lists the documents the respondent is required to submit in preparation for the hearing. Note the word 'unpublished'. Strictly speaking we do not have to serve the COIS as it is a published document, however for ease and out of courtesy we do.

Practice direction 8 should be read alongside Procedure rule 13. This explains best practice in preparing and presenting bundles.

Procedure rule 14 – Variation of grounds:

When the appellant appeals against the decision, they have to explain upon what grounds. The Procedure Rules allow appellants to amend their grounds (add, withdraw); only with the permission of the IAC though. This can (and frequently is) be done at the hearing. This Rule only permits appellants to amend their grounds of appeal against the decision under appeal – it does not allow them top make fresh applications.

Procedure rule 19 – hearing appeal in absence of a party:

This rule was amended in 2007 following a Judicial Review (the word 'must' was altered to 'may'). In preparation for every hearing you must print off the appellant's address history from CID. Should the appellant fail to attend the hearing the judge needs to be satisfied that the hearing notice was served at the correct address. The IAC's record of the appellant's address isn't always the same as ours. The judge will rely on you to ascertain where the appellant was living on the date the hearing notice was served.

Procedure rule 21 – Adjournment of appeals

When any party makes an application for an adjournment the judge has to look at procedure rule 21 to assess whether or not to grant one. A party can not simply go to the hearing and state that they want the case to be adjourned. They will have to show good reason why the adjournment is necessary (21(1)(b)), and produce evidence regarding any matter relied upon in the application (21(1)(c)).

I.e. it is not sufficient for a party to simply say that their witness is unable to attend the hearing. They will need to explain why they cannot attend and provide evidence to substantiate this (i.e. a medical report). .

The Judge can only grant the adjournment if satisfied that the appeal cannot otherwise be justly determined (21(2)).

Procedure rule 21 must be read alongside **Practice Direction 9** which explains how the adjournment request itself should be submitted.

Trainer to go through Practice Direction 9, highlighting 9.1 – 9.2, the adjournment request should be made no later than 5:00pm one clear working day prior to the hearing.

Neither party should assume that the application has been successful and not appearing to either renew the application at the hearing or for the appeal to go ahead is not acceptable. PD 9.8 makes it clear that the Tribunal, in some circumstances may proceed in absence in such a circumstance.

When considering this, you will need to make reference back to procedure rule 19.

Procedure rule 22 – Giving of determination

The judge must produce their decision in writing, even if they have given it orally at the hearing.

If the Judge has allowed or dismissed the appeal at the hearing this should be seen as an indication and not the final outcome. You will still need to complete CID with 'determination reserved' as the Judge upon review of the documents may still change their mind.

Procedure rule 45 – Directions

This rule outlines what the IAC / the judge can direct the parties to do. Most of these are dealt with by way of standard directions given as a result of the CMR hearing. What is important to note is that the judge can only direct on matters relating to the conduct of the appeal. The judge cannot direct UKBA to do anything that goes towards the decision making process i.e.

Withdraw the decision
Write a new RFRL
Re-Interview / Interview for the first time.
Make a decision on a related case

(The AIT's decisions in **K v Secretary of State for the Home Department (Kenya) [2003] UKIAT 00117**and **C v Secretary of State for the Home Department (Yugoslavia) [2003] UKIAT 00007**refer)

Also highlight to trainees that the rule permits an judge to restrict the length of evidence; submissions and the number of documents to be relied upon (45(4)(f)).

Procedure rule 48 – Representation

If the appellant has a representative who is formally providing him with immigration services in the course of a business whether for profit of not, that representative must be qualified. If the representative is not formally providing the appellant with immigration services in the course of a business then there is no need for him to be qualified e.g. a sponsor or relative (see s84 of the 1999 Act and **RK (entitlement to represent: s. 84) Bangladesh [2011] UKUT 00409(IAC))**
The representative will have to confirm that he or she is suitably qualified by signing a section 84 form prior to the hearing. According to 45 (2), CO/POs do not need to be qualified in the same way.

Procedure rule 51(4) – Evidence

Written evidence must be served in compliance with directions. If it is served late the IAC must only consider it if satisfied that there are good reasons to do so. So, if you must serve documents late you must apologise for their late submission; explain why the evidence is being served late and explain why the judge must admit it into evidence. Likewise, object to the late submission of written evidence by the appellant if satisfied that there is no good reason for the judge to consider it.

Procedure rule 52 – Language of documents.

All documents that a party relies on must be in English (or Welsh in proceedings taking place in or having a connection with Wales - It is the IAC's responsibility to have these documents translated.) or accompanied by a signed translation certifying that it is accurate. **Practice Direction 8.2(b**) takes the procedure rules further and in addition details the expectation that the identity and qualifications of the translator should also be included.

If any document is not in English, then you should urge the judge not to consider that document by relying on 52(3).

Procedure rule 53 – Burden of Proof

Q – Upon who is the burden on?
A – "He who asserts must prove"

Procedure rule 53 confirms that if the appellant asserts that the decision made should not have been taken against him / her, then the burden is upon them to prove this.

Q Any questions?

Adjournment scenarios.

Day 6

Q Any questions from yesterday? Tests trainees on what they learned.

Evidence in Chief / Examination in Chief

The purpose of evidence in chief is for the appellant to put forward their case. This is usually led by the representative (although if there isn't a representative, the judge will give the appellant an opportunity to put forward their case). It is not another opportunity for the appellant to re-tell their entire story. The standard directions sent to both parties prior to the hearing clearly state that witness statements will stand as evidence in chief. This should mean that the representative won't have to ask his client any questions, however many do but they must ask the judge's permission first before doing so.

The rep will ask the appellant to adopt IV, SEF and witness statements. By adopting the evidence, it's as if the appellant has said it all again at the hearing.

In order for the appellant to adopt the documents he/she will be asked: Do you recall being interviewed on / making this statement on? Did you answer the questions accurately / provide all of the information to the best of your knowledge? True and accurate? Read back in a language you understand? Happy to adopt as evidence today?

Supplementary questions only, this will be an exercise of clarifying discrepancies or areas of the claim that there is not much detail about

Representatives are only allowed to lead if the facts of the question are not in dispute, i.e. name, nationality, and agreed issues. If the rep is leading on other areas then you should object. Only object if the facts are in dispute *and* it will damage your case. Ask trainees for examples of leading questions.

Pay attention during evidence in chief. Some representatives may ask a lot of questions, you may find that some of these questions are about the same areas you were intending to focus on. They will be trying to clarify or explain these discrepancies. It does not prevent you from asking why the discrepancy occurred yourself.

Cross-examination

This is led by the Presenting Officer.

The aim of cross-examination is to advance the case for the Secretary of State and undermine the case for the appellant.

It is about testing evidence not obtaining new evidence, so you are not interviewing. You will need to focus on the information already provided at earlier stages by the appellant.

Although we are looking to further our case, you must not mislead the court or allow the judge to take a point that you know to be a bad one in your favour. You must submit documents or facts even if they undermine our position.

Types of questions:

Leading questions
The answer is contained in the question. You did this didn't you? It's right isn't it…? Very useful to us – again for highlighting discrepancies and getting the appellant to adopt one version of events i.e. a series of questions may be as follows:
In your witness statement you have said that you were arrested at this demonstration was that statement true?
You have also said that this demonstration was violent and there were lots of arrests correct?
So you were arrested at this demonstration because you were being violent correct?
You have just told me that you were arrested for being violent, so you were not arrested because of your political opinion then?

Closed questions
Require a limited range of possible answers – usually yes or no but not always e.g. at what time did you do that? Did you do this? They are useful for tying down an appellant on one particular version of events (especially useful with discrepancies)

Open questions
What did you do next? Can you explain? These questions are only rarely going to assist and you should avoid using them during cross. If you ask someone to explain something, they will. This will in all likelihood lead to them repeating the claim or introducing new evidence and information. You are testing the evidence that is already in existence.

Summary questions
The rounding up of one area before moving on to the next: so what you have said is that you were detained in December for 2 days, you were not mistreated and you were released without charge, is that correct? This type of question is excellent for highlighting areas that you intend to submit on.

Transitional questions / Signposting
I am now going to ask you about your second detention, your witness statement says it was in December is that correct?

Multiple questions
Avoid multiple questions, they only confuse the appellant, yourself and the judge and you're unlikely to get an answer to each question i.e. was your first arrest in December, what

treatment did you receive and after how long were you released? Ask one question at a time.

General rules of Cross-Examination:

Ask appropriate questions – cross examination should be made up largely of Closed, Leading and Summary questions.

Close the doors down the corridor. Do not simply put a discrepancy to an appellant. Anticipate the possible explanations an appellant could have for the discrepancy and try and eliminate those explanations via questions first.

Before asking any question, make sure you know the evidential value of asking it. Do you have an idea of the likely answer? Some advocates will advise that you shouldn't ask a question that you do not know the answer to. Whilst this is not strictly true – it would be impossible to know the answer to all questions, you should ensure that you have a good idea of what the likely answer will be and how you are going to deal with that answer. Every question or every series of questions should lead to a submission point. If you don't think you're gong to get a submission point from a question or series of questions then don't ask it. Are you planning to submit on it? You can only submit on points that the appellant has had an opportunity to respond to (If a point has been put to an applicant in the RFRL and they have made no attempt to rebut it then there is no need to cross-examine on this point. It is considered that the appellant has already had an opportunity to respond but chose not to) Is your question going to undermine the appellant's case and/or advance yours? If it won't, don't ask it. If your line of questions is simply allowing the appellant to explain away any discrepancies, then there is no point in asking them – that is for their rep to do during chief and re-examination.

React to the appellant's answers. All new POs are nervous when they first run a case, and it is very easy to just ask every question written down in script format no matter what answers the appellant gives. For example, if the appellant has given an answer that contradicts other evidence then be aware of it and ask a follow on question

You may find that an answer is relevant to a set of questions you had planned to tackle at the end. There is nothing wrong with changing the order of questions as long as you are signposting so that everyone knows which area you are looking at.

Question on 3-4 areas – the core of the claim. These should all be core areas where possible (Refer trainees to **Chiver (Asylum; Discrimination; Employment; Persecution) (Romania) [1994] UKIAT 10758 (24 March 1994)**Just because you do not ask about a certain part of the claim does not mean that you are accepting that it happened. A failure to challenge is not a concession.

Start and finish on the strongest points. You want your cross examination to have impact.

Do not argue with the witness but keep control. i.e. if the appellant is not answering the question, then stop them and ask them again i.e. "That is not what I asked, what I actually asked was……." give the appellant a couple of opportunities and if they continue being evasive then indicate to the judge that the question is not being answered and move on, you have made the point and can submit on it later.

Stop drilling when you hit oil / Don't ask the final fatal question. i.e. you have taken the appellant down the corridor, you have closed off the doors (potential excuses / for the discrepancy for example), you have put the discrepancy to the appellant i.e. "so when you said in your interview that you had been arrested on 2 occasions, that was a lie" – you

should not follow this with “but why did you lie?” Your submission point is that the appellant lied.

Reference all documents throughout, i.e. “In your interview (A3) at question 46…”

Don’t ask questions that the appellant could not know the answer to. i.e. “But why didn’t the police arrest you?”

Your cross examination should be concise and to the point. Do not ask 10 questions if you can get to the same point in 3.

Delegates should work individually to form a set of questions on one of the specified areas outlined in the exercise guidance. Within the guidance there is an interview, Witness statement etc references which should assist the delegates staying to the core.

Trainees should keep the questions as concise as possible, and for each theme should not ask more than 10 questions.

30 - 45 minutes is to be allowed for reading the material and formulating questions.

Trainees are to pose questions to the trainer. A note should be kept of the questions asked as this will be re-visited when we cover submissions.

Re-examination

The rep has the opportunity after cross examination to ask further questions to clarify the situation. This is their opportunity to repair the damage to the appellant’s case which you have done in cross-examination.

A rep can only re-exam on evidence that has arisen out of cross; they cannot raise new issues at this stage. The rep still is not able to ask leading questions.

The rep may attempt to ask the same questions that you asked in Cross-Examination. This is often a means of trying to obtain an answer more favourable to the appellant’s case. You should object if the rep does this. Your position is that the question has already been asked and the appellant’s answer was clear, there is no need to ask the question again.

Witnesses

Q What kinds of witnesses attend asylum appeal hearings?

Religious officials; family; friends; doctors; country experts; acquaintances from the home country etc.

Q – Do you need to cross-examine all additional witnesses?

It will depend on what part of the appellant’s case the witness is seeking to support. If the witness is a family member supporting the appellant’s article 8 case then you will almost certainly need to test their evidence. Likewise if the witness is a religious official giving evidence as to the appellant’s conversion to a particular religion.

However, if the witness purports to be from the appellant’s home country and they left their home country before the events which led to the appellant’s departure then their evidence

will probably add little to the case, in which case cross-examination will not be necessary. It is important though that you outline to the judge in your submissions exactly what your position is with regard to the witness i.e. I submit that the witness's evidence adds nothing to the appellant's case because…

When preparing for a witness it's important that you review their witness statement and establish the way in which they purport to support the appellant's case, and in some circumstances you'll need do some further research. For example, review their file and CID record. If they claim that the appellant is their sibling, but their own SEF form showed that they were an only child, then you will need to deal with this during evidence. And in the case of expert witnesses (more on this later…) you'll need to do some deeper research.

Q Would you want a witness to sit outside the court room while the appellant is giving evidence?

Yes, although, contrary to what some POs believe there is nothing compelling an appellant and their rep to send their witness outside. However, most judges and representatives recognise that it is better for the witness to remain outside. It is therefore important at the start of the hearing that you establish the whereabouts of the witness and ask the judge if they can remain outside during the appellant's evidence. If either the judge or the rep object to this the following case is useful -

RS and SS (Exclusion of appellant from hearing) Pakistan [2008] UKAIT 00012

The general rule that an appellant who is in the United Kingdom cannot be excluded from the hearing of his own appeal does not mean that he cannot, by himself or by his representative, consent to a requirement that he be absent from part of it. Evidence may gain in credibility from the removal of a possibility that a later witness has heard the evidence that an earlier witness gave. If two appeals are combined it is proper for an Immigration Judge to ask, and proper for a representative to agree, that one appellant remain outside while the other gives evidence. An alternative course of action is to hear the appeals successively.

Witness exercise

Submissions

Submissions provide the parties with an opportunity to summarise their case.

Good practice:

- **Use the correct language.** Never say, I think; I believe. Always say, I submit; in my submission.
- **Keep to the point**. Your submissions will have more impact if they are direct, relevant and concise.
- **Follow a clear order**. The submissions template will help with this.
- **Set out the case**. How does the evidence knit together to support your submissions? The judge is not interested in your opinions. Instead, your submissions should construct a convincing argument based on evidence.
- **Make an argument**. Don't simply list discrepancies. Explain to the judge why those discrepancies damage the appellant's case. For example: "I submit that the appellant is

inconsistent over how he escaped from detention. This is not an account of experience. If this appellant really did escape from detention then one would expect him to be able to recount that escape consistently. I submit that if you accept my submission on this and find that the appellant did not escape then it must follow that either the appellant was not detained in the first place or that he was detained but he was released legitimately from that detention."

- **Signpost**. For example: turning now to internal relation…
- **Know the evidence**. Make sure you tell the judge exactly where in the evidence you want him to look. For example: "At Q2 A2 the appellant claimed he was detained for 2 weeks, however at paragraph 4 of his most recent statement he said…" Don't blithely refer to a discrepancy and expect the judge to go away and find out where it is. Furthermore, as with cross-examination you do not want the judge or the Rep to stop you mid-way through your submissions to find out where the discrepancy your referring to can be found in the evidence.
- **Use a suitable pace and volume**. Be aware of your breathing, posture and relaxation as these can all have an effect.
- **If the judge intervenes, try to see this as a positive thing**. Firstly, it shows the judge is listening to what you are saying. Secondly, it can provide a useful indication of the key issues concerning the judge and, consequently, where you should focus your submissions.
- **Whilst it is advisable to prepare your submissions in advance, you should never merely read a prepared script**. The point of submissions is persuasion. You need to sound interested, passionate even, about the case and convey this to the judge.
- **Be confident**. It is very difficult to persuade someone else of an argument if you do not believe in it yourself.
- **Keep your head up**. When possible, make eye contact with the judge. This will also enable you to check that your pace is appropriate: slow enough for the judge to note down your submissions but fast enough to maintain interest.
- **Be aware of any potentially distracting habits**: excessive gesticulating, hair twiddling, use of 'um', scratching, these can all detract from your submissions.
- **Rhetorical questions can be very effective** when used appropriately. For example *"Why would the guard risk everything to help the appellant? Working in the police station, he would have seen first hand the horrific treatment he risked receiving. Would a bribe really have been sufficient to convince him? He risked losing his job, his livelihood and possibly even his life, all for a man he had never met."*
- **Analogies can also be used to good effect**. These do not have to be complex to have an impact e.g. *"We have all had the experience of walking down the street and calling to someone we thought was a friend, only to discover we have made a mistake."*
- **Anticipate the Representative's arguments, and address those arguments in your submissions.** "I'm sure the appellant's Representative will remind you of the case of **Chiver** and ask that you find the core of the claim remains intact, however I would submit that the core of the claim does not remain intact for the following reasons…"

Take delegates through the submissions template.

Go though submissions template on the handout and discuss

Formulate a submission on the questions they asked (trainers to refer to notes of what questions asked to ensure that the points were put to the appellant), or

Distinguish the case of **BK (Risk – Adultery – PSG) India CG [2002] UKIAT 03387**

Charging for Appeals

On the 19th December 2011 the Tribunal Service introduced charging for some appeals. These fees were set at £140 for an oral hearing and £80 for a paper hearing.

This charging was introduced by The First-Tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 (which can be found on the IAC website).

Broadly speaking, appeals stemming from entry clearance applications and in-country variation applications will attract a fee. Fees will not need to be paid by appellants who have been issued with a removal notice or a notice of intention to deport, nor those who are in receipt of asylum support. Full details are set out in the Fees Order.

The Tribunal Procedure (Amendment)(No.2) Rules 2011 amended the 2005 Procedure rules in line with this power.

Before an appeal can proceed, the Lord Chancellor must issue a Certificate of Fee Satisfaction. If no such certificate (this is not an actual document but rather an indication on the Tribunal Services records) has been issued then the Tribunal may not accept a notice of appeal (procedure rule 9 as amended).

The Tribunal was also given to power to award costs. Procedure rule 23A now reads:

23A

(1) Except as provided for in paragraph (2), the Tribunal may not make any order in respect of costs (or, in Scotland, expenses) pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 (power to award costs).

(2) If the Tribunal allows an appeal, it may order the respondent to pay to the appellant an amount no greater than-

a. any fee paid under the Fees Order that has not been refunded; and

b. any fee which the appellant is or may be liable to pay under that Order.

The following lines should be used as a basis for arguing that costs should not be awarded against UKBA, but will need to be tailored to the individual case at hand.

Unless it is clear that an error has been made by UKBA at the decision making stage you should generally submit that:

- Costs should not be awarded.
- The decision was made in good faith and based on the information available to the decision taker.
- The decision was taken on the individual merits of the case and in accordance with the immigration rules and relevant applicable policies.
- If the Judge is minded to take a different view to the initial decision maker on the basis of the evidence provided or attach greater weight to some evidence than has been done so by UKBA, it was clearly still open to UKBA to come to the original decision and costs should therefore not be awarded.
- If the Judge is minded to allow the appeal:
    - Merely because the appellant has paid for an appeal which has been allowed is not in itself a reason to award costs in their favour.
    - Costs should not be awarded because the appellant has contributed to the need for an appeal by (eg) not providing, or delaying provision of, all relevant

information on time; making errors in the application; not responding to UKBA enquiries; not raising human rights issues with UKBA which later form the basis for the appeal.
- In any event they should not automatically award the maximum costs allowed.

The above points are broadly supported by the IAC's Joint Presidential Guidance note No4 (2011): Fee awards in immigration appeals. This note can be found on the IAC website and, if appropriate, can be served in court to assist the Judge in reaching their decision.

Day 7

Q Any questions from yesterday? Test trainees on what they've learned.

Documents & Reports

As a general rule asylum seekers are not expected to produce documents to corroborate their asylum claims. The standard of proof is low because it is recognised that it is difficult for an asylum seeker to prove their case. An appellant in an asylum case generally won't be able to produce witnesses and documentary evidence to prove their case.

Q Could you criticise an appellant for failing to provide documentary evidence?

Possibly. If the appellant has demonstrated an ability to get hold of some documents, why haven't they been unable to obtain other documents? Sometimes the absence of evidence is telling.

You will see a range of documents produced at appeal hearings; for example:

Arrest warrants
FIRs
Court documents
Birth certificates
Death certificates
Marriage certificates
Photographs
Hospital letters
Etc.

Q Who is the burden of proof on to show that these documents are genuine?

A – He who asserts must prove. If an appellant submits a court summons they are asserting that it is a court summons therefore the burden lies with them.

Explain to trainees the key principles outlined in Tanveer Ahmed.

Tanveer Ahmed (Pakistan) [2002] UKIAT00439 *

In summary the principles set out in this determination are:

- In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.
- The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round
- Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2." (paragraph 38)

You should only assert that a document is a forgery if you have strong evidence to support that. By making the assertion you have shifted the burden on to UKBA. The standard of proof for establishing the document is forged is significantly raised to "on a balance of probabilities". When you are asserting that a document is forged, clear, unequivocal evidence is needed such as an official UKBA forgery report.

Without such evidence, you should rely on Tanveer Ahmed and ask that the judge considers the document 'in the round'.

It is perfectly permissible to point out the flaws in a document without going as far as alleging that it is forged.

Consider the following:

- Is the information contained in the document consistent with the appellant's account?
- How did the appellant obtain the document? This can often unravel an appellant's entire claim.
- Is the format of the document consistent with the format described in the background evidence?
- How did the document get from the appellant's home country to the appellant in the UK?
- Who posted it? Has the appellant provided the envelopes? If so, check the postmark. Could the document have fitted in the envelope?
- Is this the original document? If the document is merely a copy or a fax ask that the judge places little or no weight on the document.

Q You have been given an arrest warrant, what would you check on it?

Q – The appellant claims that his father was killed by rogue policemen, they have provided a death certificate to prove this. What might you say?

Q – The appellant has provided photographs of them in LTTE uniform to demonstrate that they would be at risk on return. Any comments / what look for in the photo?

Expert Reports

Practice direction 10 provides instructions for both representatives and experts. It sets out the manner in which expert evidence should be obtained and presented.

Make sure you have the practice direction at hand as you read an expert report. The practice direction provides you with a means of assessing the usefulness of an expert's evidence – your conclusions of which will form the basis of your cross-examination (if the expert is present) and submissions.

Approach an expert report in the following way:

The Author

Qualifications (What are they? Are they from a reputable academic institution?)
Experience
Is the author affiliated to reputable academic institution?
Is the author's scholarship recognized in his field?
Any significant publications?
Is the author's evidence relevant to the case, and current?
Does the author have an interests or affiliations which affect partiality?
Have the courts formed a view on the author?

The Contents

Sourcing – is it sourced and are the sources objective?
Does the report reflect the range of relevant opinion?
Are the author's areas of expertise clear?
Does the author refer to facts which may detract from their opinion?
Is the language used inflammatory or emotive? This could be a sign the expert is not objective.
Have the courts already formed a view on the evidence which the author comments on? If so, is the author's view of that evidence consistent with the court's view?
Does the report acknowledge its limitations?
Does the author acknowledge his over-riding duty to the court? And or the contents consistent with that duty or do the contents fly in the face of that duty?
Does the report contain the Statement of Truth?

How the report relates to the appellant

Is the report specific to the appellant?
If the report is simply a generic report commenting on the country situation; is it a re-cycled report? If it is, how up-to-date is it?
Has the author met the appellant? (Whether a meeting is necessary will depend on why the report has been commissioned)
What methodology was used to assess the appellant? Was the methodology appropriate?
Are the inconsistencies between the account given to UKBA and the account given to the author?
What are the author's findings? Do any of the findings support UKBA's position?

Review of expert report

Give trainees 20 minutes to review the expert report and consider in light of the key facts of the case detailed on the handouts whether the report complies with practice direction 10 and whether it assists the appellant's case.

Discuss with trainees their views and feedback using the trainers' handout for the exercise. Then give trainees an extract from the judge's determination.

Medical Reports

Q – For what reasons might you receive a medical report?

Medical reports are usually submitted for one of two reasons:

To support an appellant's credibility i.e. to show that the scars on their body occurred in the manner in which they claim or to support an Article 3/8 claim i.e. there will be a breach of one of those articles on return to the home country as a result of deterioration in their health.

Medical reports are a form of expert report but due to the nature of the report there are different elements to consider. (Refer to the handout)

Headed paper: The report should be on headed paper detailing the address; and telephone/fax number of the surgery/practice. It should also be signed by the doctor who wrote the report.

Qualifications: The doctor should outline their qualifications within the report, this usually takes a CV form. Does the doctor have appropriate qualifications to make the assessment they have. It is widely accepted that a GP is not qualified to make a diagnosis of PTSD, this requires someone to have specialist qualifications i.e. a Consultant Psychiatrist. The website address for the GMC is on the handout. If you have any concerns regarding a doctor's qualifications you can conduct a search here.

Dates: The date of the report is important in different ways depending upon the nature of the report. If the appellant has submitted the report to support an Article 3/8 claim, then the report will need to be up to date. The Judge is making an assessment of the "current medical condition" of the appellant. If the report is 6 months old for example, this will not be helpful.

If the report is intended to support the general claim of the appellant, then an assessment of its assistance needs to be made. For example, if the appellant's case is that they were raped 3 years ago, then a report obtained to confirm this but dated 2 weeks ago is unlikely to be able to confirm the event took place. Furthermore, you may need to consider why the report has only been obtained now. How long has the appellant been in the UK, and why did it take so long to obtain?

Diagnosis and Prognosis: The Judge needs to know what the doctor's diagnosis is. It is essential that this is clear. It is also essential that a clear prognosis has also been made. What is the outlook / progression of the illness likely to be for the appellant.

Treatment: It may be that the doctor hasn't recommended treatment for the appellant. In which case it may become difficult for the appellant to rely on this ground for staying in the UK. If the doctor has recommended treatment, then you will need to establish whether the appellant is actually following the recommended course. You will also need to establish

whether or not the treatment (or similar treatment) is available in the country of return, irrespective of any cost that may be attached to that treatment.

Methodology: How did the doctor arrive at their diagnosis? Did they have sight of previous medical records, or have they relied entirely upon the appellant's self-reporting. How long did they meet with the appellant prior to making the diagnosis? If they are diagnosing specific illnesses / conditions such as PTSD, did they use the appropriate diagnostic criteria? (see handout). Was the doctor sufficiently qualified to use the criteria?

Inconsistencies: Has the appellant given an account of the events that led to their departure from their home country to the doctor? Is that account consistent with the account given to UKBA? If not, not only does this call into question the credibility of the appellant but it may also undermine the doctor's diagnosis.

Objectivity: The Doctor must remain impartial. They should not stray into the role of advocate or Judge. The starting point for a doctor is to believe their patient. The Judge will be making an assessment of credibility after hearing evidence.

"As members of the Medical Foundation for the Care of Victims of Torture, the authors are no doubt perfectly within their rights not to challenge a patient's story. As lawyers we should not want to intrude into their medical expertise, but we should not be surprised to learn that the medical care of any individual in the situation in which he finds himself, is not likely in many cases to begin by accusing him of lying. But it is not the role of the doctor to provide (either generally or in particular cases) an assessment of a claimant's truthfulness. That, if the story is challenged, is for the appropriate court. (And, of course, it goes without saying that, despite the title of the body, it does not follow that the Foundation's patients have all been subject to what a lawyer would class as 'torture')" STARRED Secretary of State for the Home Department v D (Tamil) [2002] UKIAT 00702, para 71 (Devaseelan).

With regard to the final sentence of the quote, doctors do not use the same tests as the judiciary, representatives and UKBA when considering torture. Caselaw has established those tests. Therefore when a doctor refers to terms such as "Torture" it does not mean that the appellant has met the thresholds in law.

Self-reporting: The doctor would have taken the account from the appellant. This will usually be based wholly upon the appellant's own self-reporting. Is there anything in the report that suggests the doctor has actually seen the symptoms described?

Have the courts formed a view on the doctor? Search via www.bailii.org (?) or Google

Has the doctor used the Istanbul Protocol? The Istanbul Protocol is guidance for medical professionals who assess individuals who allege torture and ill-treatment and advises on how to report on the issue. It provides an assessment criterion for individual scars (see handout).

> **187**. The following discussion is not meant to be an exhaustive discussion of all forms of torture, but it is intended to describe in more detail the medical aspects of many of the more common forms of torture. For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:

(*a*) Not consistent: the lesion could not have been caused by the trauma described;

(*b*) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;

(*c*) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;

(*d*) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;

(e) Diagnostic of: this appearance could not have been caused in any way other than that described.

SA (Somalia) [2006] EWCA Civ 1302 strongly advises medical professionals to apply this criteria. They stated that such professionals would be "well-advised" to consider the Istanbul protocol regarding description or degrees of consistency of injuries (para 29).

The medical professional should assess the consistency of the scar, but also provide examples of what else may have caused the injury if their finding is one of consistent or highly consistent.

The handout provides summaries of some useful cases. Highlight some of them but don't go into too much detail.

There is a wealth of caselaw regarding medical cases and medical reports. The caselaw pages should be checked regularly.

Q Any questions?

Record of proceedings and minute writing

Record of proceedings

All parties keep a record of proceedings.

Q Why is this important?

There are several reasons why this is important:

- If the judge restricted cross examination, then the record may act as evidence at an Upper Tribunal hearing
- There may be a dispute during the course of the hearing where everyone needs to refer back to what was actually said
- The hearing may be adjourned either at the preliminary stage or part-heard, the record of proceedings is necessary so that the next hearing can progress with no disputes.

- During evidence and submissions both parties will want to take an appellant or the judge to something that has been said previously in evidence. It's very hard to do that without a written record.

CID

The appeal details screen of CID must be completed accurately within 2 working days of the hearing. This is vitally important. UKBA relies on management information obtained from CID so that we can document the work that we're doing; so that the public can see how the organisation is performing and so that we can identify any gaps or flaws in the system with a view to modifying our processes. CID must also be accurate so that we can determine at what stage in the asylum/immigration process a claimant is at. We need to know why specific action has been taken; when it was taken and why. Gaps in CID and inaccurate information on CID cause all sorts of problems further down the line. If the appeals screen has not been completed i.e. there are no hearing centre details you will need to establish what the local arrangements are for inputting that information. Your admin team may do that or you may have to do it.

Minute Writing

Refer trainees to the guidance on the handout

Remind the trainees that they may have a set template in their office so to check with their mentors.

Every time a member of staff does something with a case (either makes a decision; takes a telephone call from the subject's rep etc.) a minute must be placed on the left hand side of the file cetailing what has been done; by whom; together with the telephone number of the person taking the action and the date.

Talk through minute structure.

There needs to be 2 minutes for each case, 1 is kept on the left hand side of the file, and one is an electronic minute to the Specialist Appeals Team.

You may wish to write a handwritten minute at the hearing, or you may wish to print a copy of the SAT minute and attach that when you're back in the office. Either way, the minute should be written when the case is fresh in your mind, and it should reflect accurately what happened at the hearing.

SAT (Specialist Appeals Team) Minutes

All allowed determinations go to SAT who review them and assess whether or not we have any grounds on which to apply for permission to appeal the decision. They only receive the determination; they do not receive the file. Their reference material is CID and the electronic minute. It is vitally important that an electronic appeal hearing minute is drafted.

Further Appeals and Errors of Law

When the determination is received from the First-Tier Tribunal either party has an avenue to make an application to appeal to the Upper Tribunal on the basis that there has been a material error of law. They will first apply to the First Tier Tribunal for permission to appeal (note there is no right to an appeal to the Upper Tribunal).

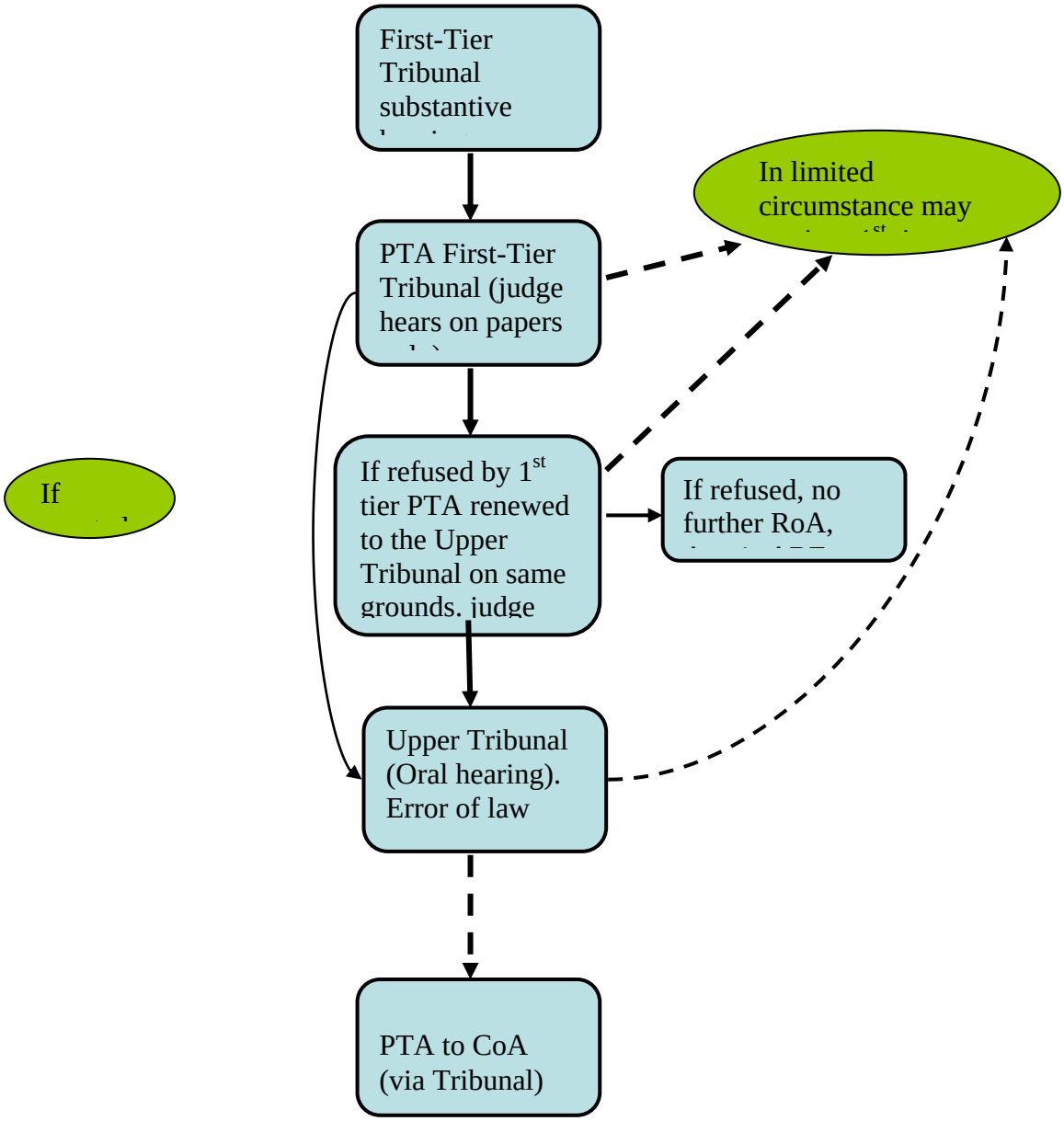
On the papers, an Upper Tribunal Judge will consider whether there is an arguable error of law. If the judge decides that they're isn't an arguable error permission will be refused. However, the application can be renewed to the Upper Tribunal.

If granted, the application is sent to the Upper Tribunal and an error of law hearing is scheduled.

Any further appeal is made to the Court of Appeal with permission being sought initially from the Upper Tribunal.

R (Iran) errors of law handout in folders. Trainer to go through the handout and give examples.

Further Appeals



Case law

There are 3 types of IAC case law that we can rely on and that you will become familiar with.

- Reported
- Country Guidance
- Starred

Reference to be made to Practice Statements and Directions

Reported determinations (Practice Statement 11):

It is a matter for the Tribunal as to whether to report a case. A decision can only be reported if at the hearing there was as a minimum of an Upper Tribunal Judge present (whether sitting as an UT or FT judge).

Reported determinations are considered persuasive.

The IAC's website is the only official source of reported (and indeed starred and CG) determinations.

Starred determinations:

(Illustrate on the board where the star will be)

Determinations are usually starred on a point of law i.e. Tanveer Ahmed is a starred determination because it instructs judges how to address documents.

A starred determination is binding on the IAC unless there is a decision of higher authority which contradicts it, and until it is superseded by a new * decision on the same point.

Country Guidance:

All parties are expected to be conversant with the most recent CG case.

Judges must follow CG cases unless they can show good reason why it does not apply in a particular case. For example, the background evidence may have changed significantly.

All other decisions of the IAC are unreported. They are not widely available and there are only very limited circumstances that they may be relied upon at the hearing. Practice Direction 11 sets out the circumstances in which this may happen.

High Court, England & Wales Court of Appeal, Court of Session (Scotland), Supreme Court

The general rule is that a decision from a higher court is binding on the courts below it. For example, a decision by the Supreme Court is binding on all lower courts, but a CoA decision would not be binding on them.

In England and Wales, a decision from the Court of Session is merely persuasive. In Scotland a decision from the Court of Appeal is merely persuasive.

European Court of Human Rights / European Court of Justice

Decisions are not necessarily binding. If the decision began in the UK i.e. the case of N, then our courts would have to follow it. Other decisions are merely persuasive.

However, as the UK is a signatory to the European Convention of Human Rights, and because the HR Act came into force in 2000, domestic courts are now obliged to make decisions that are compliant with the Human Rights Act. The UK courts and tribunals have to show that they are following European legislation, and therefore the decisions of the European Court become very relevant.

Human Rights Act 1988 – note where it states MUST take into account

2 Interpretation of Convention rights

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
(d) decision of the Committee of Ministers taken under Article 46 of the Convention,
whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

Q Any questions?

Any questions?

Ask delegates to complete the evaluation forms